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Report of the United Nations Commission on International Trade Law on its thirty-sixth session

30 June-11 July 2003

General Assembly
Official Records
Fifty-eighth session
Supplement No. 17 (A/58/17)

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-sixth session of the Commission, held in Vienna from 30 June to 11 July 2003.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the report is submitted to the Assembly and also for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. UNCITRAL commenced its thirty-sixth session on 30 June 2003.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The current members of the Commission, elected on 24 November 1997 and 16 October 2000, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Austria (2004), Benin (2007), Brazil (2007), Burkina Faso (2004), Cameroon (2007), Canada (2007), China (2007), Colombia (2004), Fiji (2004), France (2007), Germany (2007), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2007), Kenya (2004), Lithuania (2004), Mexico (2007), Morocco (2007), Paraguay (2004), Romania (2004), Russian Federation (2007), Rwanda (2007), Sierra Leone (2007), Singapore (2007), Spain (2004), Sudan (2004), Sweden (2007), Thailand (2004), the former Yugoslav Republic of Macedonia (2007), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2004) and Uruguay (2004, alternating annually with Argentina).

5. With the exception of Benin, Fiji, Honduras, Hungary, Romania, Sierra Leone and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Algeria, Antigua and Barbuda, Argentina, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Costa Rica, Czech Republic, Ecuador, Finland, Gabon, Indonesia, Lebanon, Libyan Arab Jamahiriya, Madagascar, Nigeria, Panama, Peru, Philippines, Poland, Qatar, Republic of Korea, Serbia and Montenegro, Slovakia, Switzerland, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

7. The session was also attended by observers for the following international organizations:

(a) **United Nations system**: World Bank and International Monetary Fund;

(b) **Intergovernmental organizations**: Common Market for Eastern and Southern Africa and International Institute for the Unification of Private Law (Unidroit);

(c) **Non-governmental organizations invited by the Commission**: American Bar Association, American Bar Foundation, Arab Union of International Arbitration, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Comité maritime international, European Lawyers' Union, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), International Bar Association, Inter-Pacific Bar Association, Institute of International Banking Law and Practice, International Union of Latin Notaries, Society for Worldwide Interbank Financial Telecommunication S.C. and Union internationale des avocats.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chairman: Tore Wiwen-Nilsson (Sweden)

Vice-Chairmen: Neeru Chadhah (India)
François Rwangampuhwe (Rwanda)
Oleg V. Krasnykh (Russian Federation)

Rapporteur: Juan Carlos Yepes Alzate (Colombia)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 758th meeting, on 30 June, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of the draft UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.
5. Preliminary approval of the draft UNCITRAL Legislative Guide on Insolvency Law.
6. Arbitration: progress report of Working Group II.

7. Transport law: progress report of Working Group III.

8. Electronic commerce: progress report of Working Group IV.

9. Security interests: progress report of Working Group VI.

10. Monitoring implementation of the 1958 New York Convention.

11. Possible future work in the area of public procurement.

12. Possible future work relating to commercial fraud.

13. Case law on UNCITRAL texts (CLOUT) and digest of case law on Sales Convention and other uniform texts.

14. Training and technical assistance.

15. Status and promotion of UNCITRAL legal texts.

16. General Assembly resolutions on the work of the Commission; follow-up to in-depth evaluation of work of the Commission's secretariat.

17. Coordination and cooperation.

18. Other business.

19. Date and place of future meetings.

20. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 774th and 775th meetings, on 11 July, the Commission adopted the present report by consensus.

III. Draft UNCITRAL model legislative provisions on privately financed infrastructure projects

A. Preparatory work and organization of discussions

12. One year after the adoption of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*,[2] in 2000, the Commission agreed, at its thirty-fourth session, in 2001, that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within a reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the *Legislative Guide*. Accordingly, it was agreed that at its first session the working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the *Guide*, could be formulated.[3]

13. Working Group I commenced its work on the topic at its fourth session (Vienna, 24-28 September 2001). In accordance with a suggestion made at the Commission's thirty-fourth session,[4] the Working Group was invited to devote its

attention to a specific phase of infrastructure projects, namely, the selection of the concessionaire, with a view to formulating specific drafting proposals for legislative provisions. Nevertheless, the Working Group was of the view that model legislative provisions on various other topics might be desirable (see A/CN.9/505, paras. 18-174). The Working Group requested the secretariat to prepare draft model legislative provisions in the field of privately financed infrastructure projects, based on its deliberations and decisions, to be presented to the Working Group at its fifth session for review and further discussion.

14. The Working Group continued its work on the drafting of core model legislative provisions at its fifth session (Vienna 9-13 September 2002). The Working Group reviewed the draft model provisions that had been prepared by the secretariat with the assistance of outside experts and approved their text, as set out in the annex to its report on that session (A/CN.9/521). The Working Group requested the secretariat to circulate the draft model provisions to States for comments and to submit the draft model provisions, together with the comments received from States, to the Commission, for its review and adoption, at its thirty-sixth session.

15. The Commission had before it the following documents: (a) an explanatory note on the draft model provisions (A/CN.9/522); (b) the text of the draft model provisions, as they were approved by the Working Group (A/CN.9/522/Add.1); (c) a concordance table presenting side by side the draft model provisions and the legislative recommendations to which they relate (A/CN.9/522/Add.2); (d) a compilation of comments received from Governments and international organizations on the draft model provisions (A/CN.9/533 and Add.1-7); and (e) the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*.

16. The Commission took note of the background information on the preparation of the draft model legislative provisions, as summarized by the secretariat (see A/CN.9/522) and the written comments that had been submitted by Governments and international organizations on the draft model provisions (A/CN.9/533 and Add.1-7), which had been made available ahead of the session. The Commission decided that it would consider the issues raised in those comments in the context of the draft model legislative provisions to which they pertained. The Commission agreed that, for the purpose of optimizing the use of the time available for consideration of the draft model legislative provisions, it would only deal with written comments to the extent that they were raised by delegations and observers attending the session, regardless of whether the written comments had originated from them.

17. The Commission decided to establish a drafting group to review the text and to ensure its consistency in all the language versions. The Commission agreed that editorial suggestions to improve specific language versions or correct translation errors should be dealt with directly by the drafting group.

B. Relationship between the draft model provisions and the Legislative Guide

18. The Commission concluded its deliberations on the draft model provisions (see paras. 22-170) by considering whether the model provisions and the legislative

recommendations contained in the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* should be retained as two related but independent texts or whether they should be combined in a single text and, if so, whether all the legislative recommendations should be retained or only those on which no model provision had been drafted.

19. Pursuant to one view, which gathered strong support, the model provisions should supersede and replace all legislative recommendations dealing with the same subject matter. It was acknowledged that it would not be possible for the secretariat to immediately produce a consolidated new publication of the *Legislative Guide* that also contained the combined text of model provisions and the remaining legislative recommendations. For an interim period, and until sufficient resources were available to prepare such a new publication, the model provisions could be published as a separate document, which would also contain only those few legislative recommendations which had not been replaced. As soon as practicable, however, a consolidated text should be issued, so as to avoid confusion and to make the Commission's work as user-friendly as possible.

20. The countervailing view, which eventually prevailed, was that a future consolidated publication should reproduce the full text of the legislative recommendations contained in the *Legislative Guide*. The model provisions represented an evolution of the Commission's previous work and had to be understood against that background. While there was not sufficient support for retaining the two texts indefinitely as separate publications, the prevailing view was that the legislative recommendations should be reproduced in their entirety in a consolidated publication, as they represented the basis for the subsequent work on the model provisions.

21. The Commission therefore agreed that a future consolidated publication should combine the model provisions, as adopted by the Commission (see annex I), and the notes contained in the *Legislative Guide* and should reproduce, at the end of the publication, the full text of the legislative recommendations as originally adopted by the Commission in 2000. The secretariat was requested to review and, as appropriate, revise the notes contained in the *Legislative Guide* in order to adjust them to the terminology and structure used in the model provisions.

C. Consideration of draft model provisions[5]

Foreword

22. The text of the foreword to the draft model provisions was as follows:

> "The following pages contain a set of general recommended legislative principles entitled 'legislative recommendations' and model legislative provisions (the 'model provisions') on privately financed infrastructure projects. The legislative recommendations and the model provisions are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. They are followed by notes that offer an analytical explanation of the financial, regulatory, legal, policy and other issues raised in the subject area. The user is advised to read the legislative recommendations and the model provisions

together with the notes, which provide background information to enhance the understanding of the legislative recommendations and model provisions.

"The legislative recommendations and the model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.

"The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability.

"It should be noted that the legislative recommendations and the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the *Legislative Guide*. Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law and environmental protection and consumer protection laws."

23. It was proposed that the last paragraph should also refer to tax, banking, foreign exchange and bankruptcy laws and regulations as being areas that were not addressed by the *Guide* but had an impact on privately financed infrastructure projects. An appropriate footnote or additional text in the form of a commentary should encourage Governments to authorize regulators to implement practical and straightforward regulations and procedures to implement the law. It was said, for example, that the system for converting and repatriating foreign exchange must be simple and fast. The last paragraph of the foreword should also state that experienced, transparent and predictable court systems were also essential. Finally, the paragraph should encourage Governments to reconcile inconsistencies with other conflicting laws and regulations, for example by clarifying whether the concession law of the country superseded the tax laws or laws relating to government contracts.

24. The Commission took note of that proposal, but was of the view that most of those matters were already addressed in various portions of the *Legislative Guide*, in particular in its chapter VII, "Other relevant areas of law". Nevertheless, the Commission accepted to insert a sentence at the end of the foreword drawing the attention of legislators to the relationship between legislation specific to privately financed infrastructure projects and other areas of law referred to in the foreword.

25. Subject to that amendment, the Commission approved the foreword and referred it to the drafting group.

Chapter I. General provisions

Model provision 1. Preamble

26. The text of the draft model provision was as follows:

> "WHEREAS the [Government] [Parliament] of _____ considers it desirable to establish a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;
>
> "WHEREAS the [Government] [Parliament] of _____ considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;
>
> "[*Other objectives that the enacting State might wish to state;*].
>
> "Be it therefore enacted as follows:"

27. It was suggested that draft model provision 1 would be improved if the first paragraph of the preamble was more closely aligned with the second sentence of the foreword and paragraph 4 of the introduction to the *Legislative Guide*. It was proposed to expand that paragraph to read as follows:

> "WHEREAS, the [Government] [Parliament] of _____ considers it desirable to establish a legislative framework favourable to private investment in public infrastructure; and
>
> "WHEREAS, the [Government] [Parliament] of _____ considers it desirable to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions in private sector participation in infrastructure investment, development and operation;"

28. The Commission was of the view that the draft model provision was sufficiently clear and that the proposed expansion was not needed. The Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 2. Definitions

29. The text of the draft model provision was as follows:

> "For the purposes of this law:
>
> "(a) 'Infrastructure facility' means physical facilities and systems that directly or indirectly provide services to the general public;
>
> "(b) 'Infrastructure project' means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

"(c) 'Contracting authority' means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project [under the provisions of this law];[1]

"(d) 'Concessionaire' means the person that carries out an infrastructure project under a concession contract entered into with a contracting authority;

"(e) 'Concession contract' means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

"(f) 'Bidder' and 'bidders' mean persons, including groups thereof, that participate in selection proceedings concerning an infrastructure project;[2]

"(g) 'Unsolicited proposal' means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

"(h) 'Regulatory agency' means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.[3]

"[1] It should be noted that the authority referred to in this definition relates only to the power to enter into concession contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as 'regulatory agency' in subparagraph (h), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

"[2] The term 'bidder' or 'bidders' encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

"[3] The composition, structure and functions of such regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, 'General legislative and institutional framework', paras. 30-53)."

30. A proposal was made to include a definition of the term "concession" so as to determine more clearly the scope of application of the model provisions. Such a definition was said to be necessary in order to establish clearly which law should apply to a particular contractual relationship, irrespective of the name given to the relevant contract (concession, licence, lease, usufruct rights, etc.). It was further stated that in many countries where a build-operate-transfer or concession law existed, it could be seen that contractors tried to escape its application (in particular the strict provisions on selection of concessionaires), by using different contract titles or by negating the fact that the contract involved a concession.

31. It was therefore proposed that the draft model provision could include a definition of the term "concession" as being acts attributable to the State whereby a public authority entrusted to a third party—by means of a contractual act or a unilateral act with the prior consent of the third party—the total or partial management of economic activities or services for which that authority would normally be responsible and for which the third party assumed the risk.

32. The Commission took note of that proposal, but was of the view that the new definition described a legal concept that, while familiar in some legal systems, might give rise to a number of questions in other legal systems where the notion of "concession" was not traditionally known. Furthermore, some of the elements of the proposed definition were considered to give rise to uncertainty, such as the amount of "risk" that needed to be assumed by the concessionaire in order for the project to involve a true "concession". It was felt that the existing definition, along with the notes contained in the *Legislative Guide*, provided sufficient guidance as to the types of arrangement to which the draft model provisions applied.

33. The Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 3. Authority to enter into concession agreements

34. The text of the draft model provision was as follows:

> "The following public authorities have the power to enter into concession contracts[4] for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof*].[5]

"[4] Enacting States generally have two options for completing this model provision. It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, 'General legislative and institutional framework', paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to clearly identify which entities have the power to provide such support and what kind of support may be provided (see chap. II, 'Project risks and government support').

"[5] Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to 'the Union, the states [or provinces] and the municipalities'. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revision of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder."

35. It was suggested that, in practical terms, it was always difficult to fix precisely in a concession law what assets or services might be subject to a concession and by which organ the contract might be awarded. For legislation on privately financed infrastructure projects to be acceptable, in particular in countries with economies in

transition, it was said that its provisions should not affect any previously agreed distribution of power (in particular of local self-government). It was therefore recommended to adopt a neutral provision referring to the proper authority having jurisdiction over assets and services to be conceded.

36. In response, it was said that in many countries there was considerable doubt as to which entities had the authority to award concessions and in which fields. The draft model provision represented a useful reminder of the importance of ensuring certainty in that matter. Furthermore, the draft model provision was drafted in a manner that was sufficiently flexible so as to be enacted in a manner that best suited the enacting State's constitutional and administrative system.

37. The Commission agreed to retain the current substance of the draft model provision and referred it to the drafting group.

Model provision 4. Eligible infrastructure sectors

38. The text of the draft model provision was as follows:

> "Concession contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].[6]

[6] "It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revision of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder."

39. It was observed that, in most legal systems, a concession law could not grant more rights than those granted by sectoral or specific laws. Rather than providing an indicative or exhaustive list of matters that might be the subject of a concession contract, it would be preferable to refer generally to services and assets in respect of which a concession contract could be awarded pursuant to any applicable law and, if necessary, to amend specific or sectoral laws to allow concessions, if not already provided for. Conversely, a list of assets or services that could not be conceded as being part of national sovereignty or national wealth was often established.

40. The Commission took note of those observations and suggestions. However, the Commission considered that, in much the same way as for draft model provision 3, the text under consideration was a useful reminder of the importance of the issue that left the enacting State with ample flexibility to implement it in a manner best suited to meeting its constitutional and administrative needs.

41. The Commission agreed to retain the current substance of the draft model provision and referred it to the drafting group.

Chapter II. Selection of the concessionaire

Model provision 5. Rules governing the selection proceedings

42. The text of the draft model provision was as follows:

> "The selection of the concessionaire shall be conducted in accordance with [*model provisions 6-27*] and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts*].[7]

[7] The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (the 'Model Procurement Law'). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public, bid security and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein."

43. The Commission accepted a suggestion to delete the words "bid security" in the penultimate sentence of footnote 7. No other comments or suggestions were made on the draft model provision during the session. The Commission thus approved its substance and referred it to the drafting group.

1. Pre-selection of bidders

Model provision 6. Purpose and procedure of pre-selection

44. The text of the draft model provision was as follows:

> "1. The contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

"2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].

"3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],[8] the invitation to participate in the pre-selection proceedings shall include at least the following:

"(a) A description of the infrastructure facility to be built or renovated;

"(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire);

"(c) Where already known, a summary of the main required terms of the concession contract to be entered into;

"(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

"(e) The manner and place for solicitation of the pre-selection documents.

"4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],[9] the pre-selection documents shall include at least the following information:

"(a) The pre-selection criteria in accordance with [*model provision 7*];

"(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in [*model provision 8*];

"(c) Whether the contracting authority intends to request only a limited number[10] of pre-selected bidders to submit proposals upon completion of the

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"[8] A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

"[9] A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

"[10] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, 'Selection of the concessionaire', paras. 48 and 49). See also footnote 14.

pre-selection proceedings in accordance with [*model provision 9, para. 2*], and, if applicable, the manner in which this selection will be carried out;

"(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*this State*] in accordance with [*model provision 30*].

"5. For matters not provided in this [*model provision*], the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification of suppliers and contractors*].[11]

"[11] Procedural steps on pre-qualification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7."

45. The view was expressed that subparagraph (a) of paragraph 3 was too narrow and that the words "or operated" should be added after the words "to be built or renovated". Another suggestion was to refer instead to the concept of "infrastructure project", which, as defined in draft model provision 2, subparagraph (b), included the notion of infrastructure operation.

46. In response to those proposals, it was noted that subparagraph (a) was essentially concerned with a description of the physical infrastructure and that other subparagraphs referred to elements related to the operational phase.

47. The Commission approved the substance of the draft model provision and referred it to the drafting group, in particular with a request that it offer appropriate alternative wording to subparagraph (a) of paragraph 3.

Model provision 7. Pre-selection criteria

48. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 8. Participation of consortia

49. The text of the draft model provision was as follows:

"1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with [*model provision 7*] shall relate to the consortium as a whole as well as to its individual participants.

"2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of

a consortium may participate, either directly or indirectly, in only one consortium.[13] A violation of this rule shall cause the disqualification of the consortium and of the individual members.

"3. When considering the qualifications of bidding consortia, the contracting authority shall consider the individual capabilities of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

"[13] The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project."

50. It was suggested that the draft model provision would be improved if it did not presumptively bar a member of a losing bidding consortium from joining another bidding consortium, as long as such joining was disclosed to all parties and otherwise acceptable and as long as no bidder could, at any one time, be a member of more than one bidding group.

51. There was agreement within the Commission that a bidder whose consortium abandoned or had to leave the selection procedure (for example because the consortium could not secure the required financing) but who desired instead to join another bidding group should be allowed to do so. Such a possibility was not felt to be inconsistent with legislative recommendation 16.

52. Subject to adding the words "at the same time" at the end of the first sentence of paragraph 2, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 9. Decision on pre-selection

53. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

2. Procedure for requesting proposals

Model provision 10. Single-stage and two-stage procedure for requesting proposals

54. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 11. Content of the request for proposals

55. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 12. Bid securities

56. The text of the draft model provision was as follows:

"1. The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

"2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:[19]

"(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

"(b) Failure to enter into final negotiations with the contracting authority pursuant to [*model provision 17, para. 1*];

"(c) Failure to formulate a best and final offer within the time limit prescribed by the contracting authority pursuant to [*model provision 17, para. 2*];

"(d) Failure to sign the concession contract, if required by the contracting authority to do so, after the proposal has been accepted;

"(e) Failure to provide required security for the fulfilment of the concession contract after the proposal has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

"[19] General provisions on bid securities can be found in article 32 of the Model Procurement Law."

57. The view was expressed that the draft model provision increased the recommended remedies of the contracting authority with regard to forfeiture of bid security. While the relevant portion of the *Legislative Guide* (chap. III, "Selection of the concessionaire", para. 62) merely stated that it was advisable for the request for proposals to indicate any bid security terms, paragraph 2 (b) authorized forfeiture of a bidder's security if the bidder failed to enter into final negotiations, or, as provided in subparagraph (c), if the bidder failed to formulate a best and final offer. Moreover, as currently drafted, the latter provision seemed to suggest that a bidder might forfeit its bid security merely because it had failed to formulate a "best and final offer" acceptable to the contracting authority.

58. In response, it was noted that, typically, the best and final offer and final negotiations occurred and should occur within the validity period of the bid and should be covered by the bid security. The procedure for final negotiations, including the requirement of a best and final offer, was not an unexpected event to the bidder, as they would have been advertised with the request for proposals. Furthermore, the terms of a best and final offer were entirely within the control of the bidder, who was under no obligation or constraint to improve upon its previous terms. The scope of the cross-reference to draft model provision 17 was limited to the time limit for submission of a best and final offer.

59. The Commission agreed that the concerns that had been expressed could be addressed by clarifying the relationship between draft model provisions 12 and 17. In particular, there was support for replacing the words "failure to formulate a best and final offer" in paragraph 2 (c) with the words "failure to submit its best and final offer".

60. In response to suggestions to replace the words "best and final offer", in the draft model provision and elsewhere in the text, simply with "offer" or "final offer", it was noted that the words currently used in the text were a term of art that was widely known in international procurement practice. The Commission agreed to retain that expression. The Commission also agreed to retain the word "final" before the word "negotiations" in draft paragraph 2 (b), as those words formed an expression that adequately described a particular phase of the selection process.

61. Subject to the amendment referred to above, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 13. Clarifications and modifications

62. The text of the draft model provision was as follows:

> "The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in [*model provision 11*]. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to [*model provision 26*] the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals."

63. It was proposed that the draft model provision should specify that there was no need for the contracting authority to inform the participants about the identity of the bidders. It was said that, in practice, where the identities of the bidders was known, there was a risk that a bidder might, for instance, artificially inflate its price so as to match the higher level of prices that would be expected from a particular competitor, to the detriment of the contracting authority.

64. That proposal was objected to on the grounds that, in the interest of transparency, the procurement practice in most countries required the identity of the bidders to be disclosed to any persons seeking such information. That was reflected, for example, in article 7, paragraph 6, of the Model Procurement Law, which required the procuring entity to make available "to any member of the general public, upon request, the name of the suppliers or contractors that had been pre-qualified". Anonymity in procurement proceedings was said to be anathema to transparency and should not be endorsed by the draft model provisions.

65. The question was asked whether clarifications and modifications necessarily had to be made in writing and whether the identity of the bidder that had asked the question should be disclosed. In response, it was pointed out that those questions were left to the general procurement regime of the enacting State, which could not be entirely reproduced in the draft model provisions. The underlying assumption was that such a regime should provide, as the Model Procurement Law did, that

communications other than those made during a meeting with bidders needed to be made in a manner that provided a record of the clarification sought or information provided (see the Model Procurement Law, art. 9, para. 1) and that clarifications should omit the source of the questions, so as to avoid distorting the competition among bidders (see the Model Procurement Law, art. 28, para. 1).

66. No other comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 14. Evaluation criteria

67. The text of the draft model provision was as follows:

"1. The criteria for the evaluation and comparison of the technical proposals[20] shall include at least the following:

"(a) Technical soundness;

"(b) Compliance with environmental standards;

"(c) Operational feasibility;

"(d) Quality of services and measures to ensure their continuity.

"2. The criteria for the evaluation and comparison of the financial and commercial proposals[21] shall include, as appropriate:

"(a) The present value of the proposed tolls, unit prices and other charges over the concession period;

"(b) The present value of the proposed direct payments by the contracting authority, if any;

"(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

"(d) The extent of financial support, if any, expected from a public authority of [*this State*];

"(e) Soundness of the proposed financial arrangements;

"(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

"(g) The social and economic development potential offered by the proposals.

"[20] See chap. III, 'Selection of the concessionaire', para. 74.

"[21] See chap. III, 'Selection of the concessionaire', paras. 75-77."

68. In response to a question, it was pointed out that the expression "present value" referred to a calculation method whereby future anticipated revenue or expenditures were expressed in present currency amounts that took into account future developments such as interest and exchange rates or inflation over the relevant period.

69. No other comments were made or questions raised on the draft model provision at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 15. Comparison and evaluation of proposals

70. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 16. Further demonstration of fulfilment of qualification criteria

71. The text of the draft model provision was as follows:

> "The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.[23]

"[23] Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings."

72. The question was asked whether the draft model provision also applied to consortia, or whether it was sufficient for one member of a consortium to have the required qualifications.

73. The Commission was of the view that it was implicit in the system recommended in the draft model provisions as well as in the *Legislative Guide* (for instance, in para. 41 of the notes on chap. III, "Selection of the concessionaire"), that, in respect of bidding consortia, qualification requirements (whether at the beginning or later in the selection proceedings) applied to the consortium as a whole and to each of its individual members. The Commission did not feel, however, that additional wording was needed to state that principle.

74. In response to a proposal that there should be a limit to the number of times that a contracting authority had the right to require a bidder to demonstrate again its qualifications, it was observed that the draft model provisions were based on the assumption that the parties would act in good faith and that the consequence of their failure to do so, including failure by the contracting authority, was a matter left for the general procurement regime of the enacting State.

75. No further comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 17. Final negotiations

76. The text of the draft model provision was as follows:

> "1. The contracting authority shall rank all responsive proposals and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

"2. If it becomes apparent to the contracting authority that the negotiations with the invited bidder will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the bidder fails to formulate an offer acceptable to the contracting authority within the prescribed time limit, the contracting authority shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph."

77. For the sake of clarity, it was agreed that the words "on the basis of the evaluation criteria" should be added after the words "responsive proposals" in paragraph 1.

78. The view was expressed that paragraph 2 involved the risk that any demand or unilateral imposition by the authority could lead to termination of the negotiations. In response, it was observed that the draft model provisions were meant to offer a structured procedure for final negotiations. They were not intended to curb bad faith in negotiations and indeed were not equipped for that purpose. Other remedies should be available under the general procurement regime in the enacting State to prevent and punish bad faith conduct by the contracting authority. The draft model provisions assumed the existence of a fair and transparent system of remedies, as stated, for instance, in draft model provisions 5 and 27.

79. With a view to clarifying the relationship between draft model provision 12, paragraph 2 (c), and provision 17, paragraph 2 (see paras. 58 and 59 above), it was agreed that the second sentence of draft model provision 17 should be redrafted along the following lines: "If the contracting authority does not find the proposal acceptable, it shall terminate the negotiations with the bidder concerned."

80. The question was asked whether the contracting authority should be required to negotiate with all selected bidders or whether, upon reaching agreement with one of them, it could dismiss the bidders ranked lower even before negotiating with them. If such was the intention, draft model provision 17 should be amended to include a phrase such as "but without having to negotiate with all of them" or similar words at the end of the third sentence of paragraph 2.

81. In response to that question, it was observed that the final negotiations contemplated in the draft model provision were clearly conceived as consecutive negotiations and not simultaneous negotiations. The language in the draft model provision, it was noted, borrowed from the language in article 44 of the Model Procurement Law, which dealt with the consecutive negotiation procedure for the selection of service suppliers. The proposed addition, however, was not felt to be necessary.

82. In that connection, the view was expressed that the draft model provision, while being consistent with the advice contained in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", para. 84), went beyond legislative recommendation 27. It was said that there was little reason why the contracting authority should bar itself from re-starting discussions with a bidder that was earlier rejected. Various reasons might lead to a situation where the contracting authority

could not complete negotiations with another bidder and might wish to try again with those very same bidders it had previously rejected. The complexity and prolonged nature of negotiations in such projects, it was said, made a more flexible provision desirable. The Commission took note of that view, but felt that allowing the contracting authority to reopen negotiations with a bidder with which negotiations had been terminated would amount to transforming the negotiations into simultaneous negotiations and would not be conducive to ensuring the level of transparency recommended in the *Legislative Guide*.

83. Subject to the amendments referred to above, the Commission approved the substance of the draft model provision and referred it to the drafting group.

3. Negotiation of concession contracts without competitive procedures

Model provision 18. Circumstances authorizing award without competitive procedures

84. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 19. Procedures for negotiation of a concession contract

85. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

4. Unsolicited proposals

86. The draft model provisions dealing with unsolicited proposals were clarified by a footnote.

87. No comments on the draft footnote were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 20. Admissibility of unsolicited proposals

88. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 21. Procedures for determining the admissibility of unsolicited proposals

89. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights

90. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights

91. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

5. Miscellaneous provisions

Model provision 24. Confidentiality of negotiations

92. The text of the draft model provision was as follows:

> "The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to [*model provisions 10, para. 3, 17, 18, 19 or 23, paras. 3 and 4*] shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person, apart from its agents, subcontractors, lenders, advisers or consultants, any technical, price or other information that it has received in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party."

93. The view was expressed that the draft model provision went beyond legislative recommendation 36 in stating that all "communications" with bidders would be confidential. Another problem was that the third sentence referred only to confidential information that a party had "received", but not to confidential information that a party might have provided. As currently drafted, the draft model provision seemed to imply that a bidder would not be allowed to share with its agents, subcontractors, lenders, advisers or consultants any technical, price or other information it had provided. That problem, it was said, could be adequately addressed by adding the phrase "with appropriate exceptions, as may be provided in the request for proposals or negotiated with the contracting authority" at the end of the third sentence.

94. The Commission recognized the difficulties raised by the current text, but was not satisfied that the proposed amendment would be sufficient to solve them, in particular because the text, as it stood, already referred to a party's consent to sharing of information. The Commission then proceeded to consider various alternative proposals, eventually agreeing on the following amendments to the third sentence of the model provision: insert the words "or permitted by the request for proposals" after the words "court order"; delete the words "apart from its agents, subcontractors, lenders, advisers or consultants"; and delete the words "that it has received" after the words "other information".

95. Subject to those amendments and to deleting the words "of negotiations" in the heading, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 25. Notice of contract award

96. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 26. Record of selection and award proceedings

97. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 27. Review procedures

98. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Chapter III. Construction and operation of infrastructure

Model provision 28. Contents of the concession contract

99. The text of the draft model provision was as follows:

"The concession contract shall provide for such matters as the parties deem appropriate, such as:

"(a) The nature and scope of works to be performed and services to be provided by the concessionaire [*see chap. IV, para. 1*];

"(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract [*see recommendation 5*];

"(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

"(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with [*model provision 30*] [*see recommendations 42 and 43 and model provision 30*];

"(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with [*model provisions 31-33*] [*see recommendations 44 and 45 and model provisions 31-33*];

"(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority [*see recommendations 46 and 48*];

"(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility [*see recommendation 52*];

"(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users [*see recommendation 53 and model provision 38*];

"(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements [*see recommendations 52 and 54, subpara. (b)*];

"(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations [*see recommendation 54, subpara. (a)*];

"(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled [*see chap. IV, paras. 73-76*];

"(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons [*see recommendation 56*];

"(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project [*see recommendation 58, subparas. (a) and (b)*];

"(n) Remedies available in the event of default of either party [*see recommendation 58, subpara. (e)*];

"(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control [*see recommendation 58, subpara. (d)*];

"(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination [*see recommendation 61*];

"(q) The manner for calculating compensation pursuant to [*model provision 47*] [*see recommendation 67*];

"(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire [*see recommendation 69 and model provision 49*]."

100. It was suggested that the draft model provision would benefit by the inclusion of a reference to each of the model provisions that concerned the contents of the

concession contract. Otherwise, some model provisions of significance might appear to be subordinated. Furthermore, the draft model provision should also refer to the following: the available enforcement mechanisms if any public user of the infrastructure facility did not pay for the services provided; the allocation of risk for undisclosed defects in facilities to be rehabilitated; and the allocation of risk for undisclosed environmental conditions for facilities to be operated or renovated by the concessionaire. As an alternative, those topics could be mentioned in a footnote to the draft model provision. Other additional topics mentioned in the course of the deliberations included payments that the concessionaire might be required to make to the contracting authority.

101. While acknowledging the relevance of those additional matters, the Commission was generally inclined not to expand the list of subjects referred to in the draft model provision, in particular as some of the matters mentioned in the proposal had not been discussed in the *Legislative Guide*. The Commission agreed, however, that for purposes of clarity, a footnote should be added to the *chapeau* of the model provision to remind enacting States that the inclusion in the concession contract of provisions dealing with some of the matters listed in the model provision was mandatory pursuant to other model provisions.

102. The Commission noted that the Working Group, at its fourth session, in 2001, had generally taken the view that various matters dealt with in chapter IV of the *Legislative Guide* were contractual in nature and did not require specific draft model provisions (see A/CN.9/505, paras. 110-116). At the same time, however, the Working Group had agreed that it would be useful to formulate a model provision that listed essential issues that needed to be addressed in the project agreement. The current list had been drawn up on the basis of the headings that preceded recommendations 41-68, with the adjustments that might be required so as to spell out clearly, but without unnecessary details, the various topics that needed to be covered by project agreements (A/CN.9/505, para. 114). Some of those issues were also the subject of specific draft model provisions. Other issues listed therein, however, related to legislative recommendations on which the Working Group did not request that specific draft model provisions be drafted (see A/CN.9/522, para. 56).

103. The Commission was aware of the overlap between some of the matters referred to in the list and a few matters dealt with in the following draft model provisions. That situation was a reflection of varying understandings in different legal systems as to which matters were of a contractual and which were of a statutory nature. Overall, the draft model provisions contained in chapters III, IV and V expressed a compromise that had been arrived at in the Working Group and it would be preferable for the Commission to avoid revisiting that decision of the Working Group.

104. Furthermore, it was noted that the words "such as" in the *chapeau* of the draft model provision had been chosen by the Working Group to emphasize the idea that the list, albeit relating to essential matters, was merely indicative and was not meant to be mandatory in its full length. The Commission then considered various proposals to improve the formulation of the draft model provision. One such proposal was to replace the words "such as" in the *chapeau* with the words

"including, without limitation, any of the following". Another proposal was to add a footnote containing language to the effect that the list was not exhaustive and that the parties to the concession contract could agree on provisions on any other matters they deemed appropriate, including those referred to in other model provisions. An alternative proposal was to present such a statement in a separate paragraph, rather than in a footnote.

105. After extensive discussion of those proposals, and noting that they had not obtained sufficient support, the Commission decided to retain the current formulation of the draft model provision, subject to adding a subparagraph referring to the extent to which information should be treated confidentially. The Commission also agreed that the title of the chapter should read "Concession contract" rather than "Construction and operation of infrastructure".

106. Subject to those amendments, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 29. Governing law

107. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 30. Organization of the concessionaire

108. The text of the draft model provision was as follows:

> "The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*this State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws and significant changes therein shall be set forth in the concession contract."

109. Subject to adding the words "consistently with the terms of the request for proposals" at the end of the second sentence, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 31. Ownership of assets

110. Other than editorial suggestions, no comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 32. Acquisition of rights related to the project site

111. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 33. Easements

112. The text of the draft model provision and the footnote to its heading was as follows:

> "The concessionaire shall [have] [be granted] the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

"[39] The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 30-32). The alternative wording offered within the first set of square brackets in the model provision is intended to reflect those options."

113. The view was expressed that, as currently drafted, the draft model provision was excessively compressed and did not adequately render the various possibilities for the creation of easements that might be required for the implementation of privately financed infrastructure projects.

114. It was pointed out that usually it was not an expeditious or cost-effective solution to leave it to the concessionaire to acquire easements directly from the owners of the properties concerned. Thus, the draft model provision should more clearly provide that those easements should be compulsorily acquired by the contracting authority simultaneously with the project site.

115. However, it was noted that, as indicated in the *Legislative Guide* (chap. IV, "Construction and operation of infrastructure", para. 32), in some countries the law itself empowered public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure. Such an approach might obviate the need to acquire easements in respect of individual properties. This was one of the alternatives that the draft model provision appeared to attempt to address, although without the desirable degree of clarity.

116. The Commission considered various proposals for improving the text of the draft model provision. The Commission eventually agreed that greater clarity could be reached by aligning the draft model provision with the more analytical structure of draft model provision 32 and providing two variants in its paragraph 1 for the possible sources of easements (i.e. legislation itself or an act of the contracting authority or other public authority), whereas paragraph 2 should refer to the observance of the country's legislation on procedures for the creation of easements.

117. The Commission requested the drafting group to prepare an appropriate text to replace the current draft model provision along those lines.

Model provision 34. Financial arrangements

118. The text of the draft model provision was as follows:

> "The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides. The concession contract shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].[40]

"[40] Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as 'tariffs', may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, 'Project risks and government support', paras. 30-60). The cost at which public services are provided is typically an element of the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of 'reasonableness', 'fairness' or 'equity' (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 36-46)."

119. The view was expressed that the draft model provision should refer to the contracting authority's power to make direct payments to the concessionaire as a substitute for, or in addition to, service charges paid by end users, a matter of considerable commercial importance that was addressed in legislative recommendation 48.

120. That proposal was initially met with some reservations, in particular because the matter was referred to in draft model provision 28, subparagraph (f). In response to those reservations, it was observed that the reference in draft model provision 28, subparagraph (f), was to the inclusion of appropriate provision in the concession contract, a technique that might not be sufficient in some legal systems where the contracting authority might require statutory permission to commit itself to making direct payments to the concessionaire.

121. The Commission accepted that proposition and agreed to include a second paragraph in the draft model provision to the effect that the contracting authority should have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

122. In order to avoid the impression that the draft model provision created a peremptory right of the concessionaire to charge, receive or collect tariffs or fees for the use of the facility or its services, the Commission agreed to combine the two sentences of paragraph 1. The new text should make it clear that the concessionaire's right was to be "in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees".

123. Subject to those amendments, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 35. Security interests

124. The text of the draft model provision was as follows:

"1. Subject to any restriction that may be contained in the concession contract,[41] the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

"(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

"(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

"2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

"3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*this State*].

"[41] These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project."

125. It was pointed out that in some legal systems a provision in the concession contract that limited the concessionaire's right to create security interests might not be sufficient to effectively prevent the creation of security interest in contravention of such a contractual provision, since the restriction by the concession contract might not be effective vis-à-vis third parties. The Commission took note of that observation and was aware of the fact that the practical implementation of the draft model provision might require additional steps in some legal systems. It was said, however, that the draft model provision nevertheless reflected an important principle of law in several legal systems..

126. In that connection, the view was expressed that the draft model provision appeared to dilute the affirmative recommendations contained in legislative recommendation 49 in important respects, including whether or not the concessionaire should have the right to create security over the project assets that it owned, by stating that restrictions might appropriately be included in the concession contract. It was suggested that the problem could be solved by deleting the opening clause beginning with the words "subject to", as well as footnote 41.

127. In response to that proposal, it was observed that the draft model provision dealt with a sensitive issue of public policy and that its current wording

reflected an acceptable compromise between initially conflicting views on the matter during the preparation of the *Legislative Guide*.[6] It was pointed out that, in some legal systems, any security given to lenders that made it possible for them to take over the project was only allowed under exceptional circumstances and under certain specific conditions, namely, that the creation of such security required the agreement of the contracting authority; that the security should be granted for the specific purpose of facilitating the financing or operation of the project; and that the security interests should not affect the obligations undertaken by the concessionaire. Those conditions often derived from general principles of law or from statutory provisions and could not be waived by the contracting authority through contractual arrangements.

128. Having considered those views, the Commission agreed to retain the substance of the draft model provision and referred it to the drafting group.

Chapter III. Construction and operation of infrastructure

Model provision 36. Assignment of the concession contract

129. The text of the draft model provision was as follows:

> "Except as otherwise provided in [*model provision 35*], the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service."

130. In response to a query concerning the meaning of the words "shall set forth" and "shall give its consent" in the second sentence, it was pointed out that the draft model provision would make it mandatory to spell out in the concession contract the conditions for authorizing an assignment of the concessionaire's rights and that, once such conditions were met, the contracting authority would be under an obligation to agree to an assignment.

131. No other comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 37. Transfer of controlling interest in the concessionaire

132. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 38. Operation of infrastructure

133. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 39. Compensation for specific changes in legislation

134. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 40. Revision of the concession contract

135. The text of the draft model provision was as follows:

> "1. Without prejudice to [*model provision 39*], the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:
>
> "(a) Changes in economic or financial conditions; or
>
> "(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;
>
> provided that the economic, financial, legislative or regulatory changes:
>
> "(a) Occur after the conclusion of the contract;
>
> "(b) Are beyond the control of the concessionaire; and
>
> "(c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.
>
> "2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes."

136. In response to a question regarding the differences between the draft model provision and legislative recommendation 58, subparagraph (c), it was pointed out that a number of elements had been added to the language of the legislative recommendation so as to reflect the depth of the discussion in paragraphs 126-130 of chapter IV, "Construction and operation of infrastructure: legislative framework and project agreement", of the *Legislative Guide*.

137. No other comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 41. Takeover of an infrastructure project by the contracting authority

138. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 42. Substitution of the concessionaire

139. The text of the draft model provision was as follows:

> "The contracting authority may agree with the entities extending financing for an infrastructure project on the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.[43]

"[43] The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority."

140. The proposal was made that the draft model provision should be amended in order to provide that the concessionaire should be a party to the agreement that set forth the terms and conditions of the concessionaire's substitution. In support of that proposal, it was stated that a distinction must be made between, on the one hand, agreeing on the principle of the right of substitution and, on the other, setting out the procedure for effecting the substitution. It would be erroneous to suggest, it was further stated, that a right of substitution could be established without the agreement of the concessionaire. If the implementation of such a right remained at the option of the lenders, under a direct agreement with the contracting authority, the very existence of that right must be agreed by the concessionaire.

141. The Commission agreed that the words "and the concessionaire to provide for" should be inserted after the words "infrastructure project".

142. No other comments on the draft model provision were made at the session. The Commission thus approved its substance, as amended, and referred it to the drafting group.

Chapter IV. Duration, extension and termination of the concession contract

1. Duration and extension of the concession contract

Model provision 43. Duration and extension of the concession contract

143. The text of the draft model provision was as follows:

> "1. The term of the concession contract, as stipulated in accordance with [*model provision 28, subpara. (p)*], shall not be extended except as a result of the following circumstances:

"(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control;

"(b) Project suspension brought about by acts of the contracting authority or other public authorities; or

"(c) [*Other circumstances, as specified by the enacting State.*][44]

"2. The term of the concession contract may further be extended to allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs during the original term.

"[44] The enacting State may wish to consider the possibility of authorizing a consensual extension of the concession contract pursuant to its terms for compelling reasons of public interest."

144. The view was expressed that the draft model provision, in particular subparagraph (c), was too restrictive, as it did not provide for the possibility for the contracting authority and the concessionaire to agree on the extension of the term of the concession in the concession contract. It was said that, as it was generally not advisable to exclude entirely the option to negotiate the extension of the concession period, the footnote could be modified by replacing the words "compelling reasons of public interest" with the words "under certain specific circumstances (as specified in the concession contract)".

145. While there was some support for that proposal, the Commission also heard strong objections to it. It was pointed out that the provision reflected the advice of the *Legislative Guide* according to which such an extension should only be permissible if that possibility was set forth in the law of the enacting State. As currently drafted, and in keeping with the Commission's policy as expressed in the *Legislative Guide*, the footnote reminded States that they might wish to consider the possibility of an extension of the concession contract by mutual agreement between the contracting authority and the concessionaire, but only for compelling reasons of public interest. Furthermore, such an additional possibility of extension would have to be expressed in the law itself.

146. After extensive deliberations on the matter, and having considered various alternative proposals, the Commission agreed to insert the words "for the law" after the word "possibility" in the footnote and, in the same sentence, to add a reference to a duty of the contracting authority to justify the reasons for such an extension in the records it was required to maintain.

147. At that juncture, it was observed that the title of chapter IV of the draft model provisions ("Duration, extension and termination of the concession contract") was incorrect, since none of the provisions contained therein dealt with the duration of a concession contract. It was suggested that the word "duration" should be deleted from the title. In support of that proposal it was stated that the very notion of a specified duration for infrastructure concessions might not always be relevant, as

States might transfer to the private sector for an indefinite period responsibility for providing certain services previously provided by the State.

148. In response to that proposal, it was pointed out that the policy adopted by the Commission in the *Legislative Guide* was that infrastructure concessions often involved an element of monopoly and that an excessively generous regime regarding their duration or extension might not be consistent with the laws and policies concerning competition of a number of countries. Clear rules on the matter were also needed in order to ensure transparency and protect the public interest. However, it was recognized that the draft model provision dealt only in part with those issues and that an additional provision was needed to the effect that the concession contract should specify the duration of the concession. The reference to the duration of the concession in draft model provision 28, subparagraph (p), was said to be insufficient, since the list contained in that draft model provision was not mandatory.

149. Having considered the various views that were expressed, the Commission agreed to insert a sentence at the beginning of the draft model provision whereby the duration of the concession should be set forth in the concession contract.

150. It was pointed out that, as currently drafted, the draft model provision seemed to suggest a different treatment for the circumstances listed in subparagraphs (a)-(c) of paragraph 1 from the case contemplated in paragraph 2. The draft model provision also left room for interpretation as to whether a concessionaire had a right, possibly enforceable through the agreed dispute settlement mechanisms, to demand an extension of the concession contract or whether an extension was always subject to negotiation and agreement between the parties. It was generally agreed that extensions of the concession should always require prior agreement of the parties. With a view to reflecting that principle more clearly, the Commission agreed that paragraphs 1 and 2 should be combined and that the *chapeau* should refer to the contracting authority's consent.

151. No other comments on the draft model provision were made at the session. The Commission thus approved its substance, as amended, and referred it to the drafting group.

2. Termination of the concession contract

Model provision 44. Termination of the concession contract by the contracting authority

152. The text of the draft model provision was as follows:

"The contracting authority may terminate the concession contract:

"(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

"(b) For [compelling][45] reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

"(c) [*Other circumstances that the enacting State might wish to add in the law.*]

"[45] [Possible situations of a compelling reason of public interest are discussed in chapter V, 'Duration, extension and termination of the project agreement', paragraph 27, of the Legislative Guide.]"

153. Several questions were raised concerning the meaning of the word "reasonably" in subparagraph (a), which was felt to be ambiguous, to involve subjective judgement and to give rise to uncertainty in the application of the draft model provision. Another criticism was that the threshold for termination of the concession contract was said to be lower than the threshold for temporary takeover of an infrastructure project by the contracting authority under draft model provision 41, which was only possible in case of "serious failure" by the concessionaire to deliver the public service.

154. In response to those questions it was observed that the generally agreed understanding of the Commission was that, given the serious consequences of termination, such as that provision of the service might be interrupted or even discontinued, termination should under most circumstances be regarded as a measure of last resort. The *Legislative Guide* went further to state that it was generally advisable to provide that the termination of the project agreement in most cases should require a final finding by the dispute settlement body provided for in the agreement (chap. V, "Duration, extension and termination of the project agreement", para. 13). The threshold contemplated in subparagraph (a) of the draft model provision was by no means lower than the threshold envisaged in draft model provision 41. Indeed termination under draft model provision 44, subparagraph (a), was only possible in case of the permanent failure of or impossibility for the concessionaire to carry out its obligations under the concession contract. The assessment of the extent of the nature of the concessionaire's inability or unwillingness to perform was not a subjective judgement of the contracting authority, which was clear from the impersonal formulation used in subparagraph (a) (i.e. when "it can no longer be reasonably expected"). The test of reasonableness was said to be used in various legal systems and would not be satisfied by a mere fear or unsubstantiated opinion of the contracting authority.

155. Having considered those views, and subject to removing the square brackets around the word "compelling" and around footnote 45, the Commission approved the substance of the draft model provision and referred it to the drafting group.

Model provision 45. Termination of the concession contract by the concessionaire

156. The text of the draft model provision was as follows:

"The concessionaire may not terminate the concession contract except under the following circumstances:

"(a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;

"(b) If the conditions for a revision of the concession contract under [*model provision 40, para. 1*] are met, but the parties have failed to agree on a revision of the concession contract; or

"(c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, such as those referred to in [*model provision 28, subparas. (h) and (i)*], and the parties have failed to agree on a revision of the concession contract."

157. The view was expressed that the draft model provision, in particular its subparagraph (b), was excessively favourable to the concessionaire and potentially harmful to the public interest. In response it was pointed out that the draft model provision had to be read in conjunction with the advice provided in the *Legislative Guide*, which made it clear that, in fact, the rights of termination of the concessionaire were more limited than those of the contracting authority. The relevant portion of the *Legislative Guide* indicated that while the contracting authority in some legal systems retained an unqualified right to terminate the project agreement, the grounds for termination by the concessionaire were usually limited to serious breach by the contracting authority or other exceptional situations and did not normally include a general right to terminate the project agreement at will. Moreover, the *Legislative Guide* recognized that some legal systems did not recognize the concessionaire's right to terminate the project agreement unilaterally, but only the right to request a third party, such as the competent court, to declare the termination of the project agreement (chap. V, "Duration, extension and termination of the project agreement", para. 28).

158. No other comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 46. Termination of the concession contract by either party

159. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

3. Arrangements upon expiry or termination of the concession contract

Model provision 47. Financial arrangements upon expiry or termination of the concession contract

160. The text of the draft model provision was as follows:

"The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works

performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits."

161. The Commission agreed that the section heading preceding the draft model provision should be amended to read "Arrangements upon termination and expiry of the concession contract". The Commission also agreed that the title of the draft model provision should read "Compensation upon termination or expiry of the concession contract".

162. The Commission accepted a proposal that the draft model provision reflect the substance of legislative recommendation 67.

163. No other comments on the draft model provision were made at the session. The Commission thus approved its substance, as amended, and referred it to the drafting group.

Model provision 48. Wind-up and transfer measures

164. The text of the draft model provision was as follows:

"The concession contract shall set forth, as appropriate, the rights and obligations of the parties with respect to:

"(a) Mechanisms and procedures for the transfer of assets to the contracting authority, where appropriate;

"(b) The transfer of technology required for the operation of the facility;

"(c) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

"(d) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire."

165. The Commission took note of the view that the reference to transfer of technology, including the relevant notes in the *Legislative Guide*, was somewhat dated and that it would have been preferable to refer to more modern concepts such as licensing of intellectual property rights, copyrights and other neighbouring rights.

166. The Commission accepted a proposal that the draft model provision should include a provision reflecting the principle of legislative recommendation 66, which required criteria for establishing compensation to the concessionaire for assets transferred upon expiry or termination of the project agreement.

167. No other comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Chapter V. Settlement of disputes

Model provision 49. Disputes between the contracting authority and the concessionaire

168. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 50. Disputes involving customers or users of the infrastructure facility

169. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

Model provision 51. Other disputes

170. No comments on the draft model provision were made at the session. The Commission thus approved its substance and referred it to the drafting group.

D. Adoption of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects

171. The Commission, after consideration of the text of the draft model provisions as revised by the drafting group, adopted the following decision at its 768th meeting, on 7 July 2003:

"*The United Nations Commission on International Trade Law*,

"*Bearing in mind* the role of public-private partnerships to improve the provision and sound management of infrastructure and public services,

"*Recognizing* the need to provide an enabling environment that both encourages private investment in infrastructure and takes into account the public interest concerns of the country,

"*Emphasizing* the importance of providing efficient and transparent procedures for the award of privately financed infrastructure projects and of facilitating project implementation by rules that enhance transparency, fairness and long-term sustainability and remove undesirable restrictions on private sector participation in infrastructure development and operation,

"*Recalling* the valuable guidance it has provided[1] to Member States towards the establishment of a favourable legislative framework for private participation in infrastructure development through the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*,[2] which was welcomed by the General Assembly in its resolution 56/79 of 12 December 2001,

"*Believing* that the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects will be of further assistance to

[1] See *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 155-161.

[2] United Nations publication, Sales No. E.81.V.6.

States, in particular developing countries, in establishing an appropriate legislative framework for such projects,

"1. *Adopts* the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects as they appear in annex I to the report on its thirty-sixth session;

"2. *Requests* the Secretariat to transmit the text of the Model Legislative Provisions along with the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*[2] to Governments, relevant international intergovernmental and non-governmental organizations, private sector entities and academic institutions;

"3. *Also requests* the Secretariat, subject to availability of resources, to consolidate in due course the text of the Model Legislative Provisions and the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* into one single publication and, in doing so, to retain the legislative recommendations contained in the *Legislative Guide* as a basis of the development of the Model Legislative Provisions;

"4. *Recommends* that all States give due consideration to the UNCITRAL Model Legislative Provisions and the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* when revising or adopting legislation related to private participation in the development and operation of public infrastructure."

IV. Draft UNCITRAL legislative guide on insolvency law

A. Preliminary approval of the draft UNCITRAL legislative guide on insolvency law

172. The Commission expressed its satisfaction with the progress of Working Group V (Insolvency Law) in developing the draft legislative guide on insolvency law, commending the level of consensus achieved in a very complex area of law and the comprehensive and balanced nature of the draft text. It was suggested that the solutions in the draft legislative guide could provide useful guidance for States of different legal traditions and different levels of economic development.

173. Recognition was given to the open and transparent nature of the Commission process and to the contributions to the development of the draft legislative guide of a broad range of participants, which were acknowledged as important to the achievement of a widely acceptable product that would be readily used by States. The Commission expressed its appreciation for the level of cooperation and coordination with international organizations in the development of the draft guide and stressed the need to maintain that coordination and cooperation, not only to finalize the text, but also to promote awareness and to facilitate use of the draft guide. The UNCITRAL/International Federation of Insolvency Professionals International Judicial Colloquium, held in London on 16 and 17 July 2001, was cited as an example of an approach that might be adopted.

174. The representative of the International Monetary Fund stated that there was need for convergence around a single internationally developed standard to assist in

insolvency law reform, where that standard combined both flexibility, acknowledging different approaches, and specificity, providing detailed guidance on those approaches. The contribution of the draft legislative guide in that regard was commended. The Commission noted that the World Bank, which had described its work to the Commission in general terms, was currently revising its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. It was widely agreed that, in developing texts on insolvency law, both duplication of effort and divergence in the texts should be avoided, while respecting the different mandates of the Commission and the World Bank. The common objectives of the draft guide and the World Bank *Principles* were noted and a cooperative approach to achieve convergence was strongly recommended. To that end, it was proposed that issues of divergence be considered at the next session of the Working Group and that the World Bank make the relevant documents available to facilitate that discussion.

175. The Commission noted that a number of recent efforts to reform insolvency law had been influenced by the draft legislative guide and that its completion would greatly assist future efforts in that area.

176. The Commission also noted the collaboration between Working Group V and Working Group VI (Security Interests) on the treatment of secured creditors and security interests in insolvency and stressed the need to continue that collaboration in completing the draft legislative guide.

177. Broad support was expressed in favour of approving in principle the key objectives and major policies of the draft legislative guide, while noting that the work had not yet been completed and some further development and refinement would be required. The Commission considered the broad policy approach of each chapter of the draft guide. It was noted that the issues discussed (see below) would be taken into account in the future revision of the text and brought to the attention of Working Group V at its next session.

Part One. Designing the structure and key objectives of an effective and efficient insolvency regime

Chapter I. Introduction to insolvency procedures

A. Key objectives of an effective and efficient insolvency regime

178. The view that the key objectives were well-targeted and reflected the components necessary for effective and efficient insolvency regimes was widely supported, subject to minor drafting changes. In particular it was suggested that paragraph 1 (see A/CN.9/WG.V/WP.63/Add.2) might be more balanced in its reference to the interests affected by an insolvency law, that paragraph 24 might be expanded to include references to the structure of an insolvency regime and to the possible use of out-of-court processes and that the last sentence of key objective 5 might be more flexible in its reference to application of the stay to secured creditors.

179. No comments of substance were raised with respect to sections B, "Balancing the key objectives", and C, "General features of an insolvency regime".

Chapter II. Types of insolvency proceedings

180. No comments of substance were made with respect to section A, "Liquidation".

B. Reorganization

181. Some concerns were expressed with respect to the inclusion of material on informal reorganization processes in a guide related principally to insolvency legislation and, in particular, with respect to the level of detail of the treatment of those processes in the introductory chapter. The Commission recognized, however, that those types of process were increasingly being developed, that they were a useful addition to the tools available for addressing financial distress and that the mandate given to the Working Group included consideration of out-of-court reorganization. In addition, the description of those processes served to introduce the expedited reorganization processes described in part two, chapter V. It was suggested that when discussing the part of the draft legislative guide relating to informal reorganization processes, the Working Group should bear in mind the interests of the debtor. Concern was also expressed with respect to those processes described as "administrative" processes in part one, chapter II, section C, and to their relevance to a commercial insolvency regime, although it was also noted that those types of process had been widely developed and used to address recent systemic situations and for that reason should be mentioned in part one.

182. No comments of substance were made with respect to section D, "The structure of the insolvency regime".

Part Two. Core provisions of an effective and efficient insolvency regime

Chapter II. Application and commencement

183. No comments of substance were made with respect to sections A, "Eligibility and jurisdiction", and B, "Application and commencement criteria", of chapter II (see A/CN.9/WG.V/WP.63/Add.3 and 4).

Chapter III. Treatment of assets on commencement of insolvency proceedings

A. Assets to be affected

184. It was suggested that greater emphasis should be given to management of assets, as opposed to administration or disposition. With respect to the time of constitution of the estate in paragraph 65 of section A (see A/CN.9/WG.V/WP.63/Add.5), it was suggested that the implications of the estate being constituted retrospectively to the date of application to address, for example, transactions entered into between application and commencement, should be discussed further.

185. No comments of substance were raised with respect to sections B, "Protection and preservation of the insolvency estate", and C, "Use and disposition of assets" (see A/CN.9/WG.V/WP.63/Add.6 and 7).

D. Treatment of contracts

186. While noting the importance of labour contracts and their treatment in insolvency law, the Commission acknowledged that those contracts raised complex and difficult issues of both national and international law that could not be comprehensively addressed in the draft legislative guide (see A/CN.9/WG.V/WP.63/Add.8). The Commission noted, however, that the reorganization processes discussed in the draft guide were aimed specifically at facilitating business recovery and preserving employment.

E. Avoidance proceedings

187. It was suggested that the draft legislative guide (see A/CN.9/WG.V/WP.63/Add.9) should discuss further the implications of the suspect period applying retrospectively from either application or commencement and, more generally, that the effects of application and commencement and their treatment in the draft guide might need to be examined more closely to ensure consistency. A question was raised with respect to "undervalued" transactions and what would constitute a sufficient undervalue, and how that value would be determined, for the purposes of avoidance.

F. Set-off and netting

188. The Commission noted the key importance of set-off and netting to the proper functioning and stability of the international financial system and financial transactions and to ensuring predictability and certainty in the insolvency context of the rights of parties to those transactions. It was expected that the Working Group, at its next meeting, would assure that those systems would not be adversely affected.

Chapter IV. Participants and institutions

189. No comments of substance were raised with respect to sections A, "The debtor", and B, "The insolvency representative" (see A/CN.9/WG.V/WP.63/Add.10).

C. Creditors

190. The Commission took note of the concerns expressed with respect to the various mechanisms for creditor participation in insolvency proceedings and the need for greater clarity, in particular with respect to the relationship between the rights of creditors individually and the mechanisms for representation (see A/CN.9/WG.V/WP.63/Add.11).

D. Institutional framework

191. The Commission noted the key importance of the institutional framework to the efficient and effective functioning of an insolvency regime. It also took note with appreciation of the work on capacity-building being done by the World Bank (see A/CN.9/WG.V/WP.63/Add.11).

Chapter V. Reorganization

A. The reorganization plan

192. It was proposed that the treatment of secured creditors in reorganization should be set forth clearly in the draft guide and, in particular, in respect of the voting of secured creditors on the plan as a class or otherwise (see A/CN.9/WG.V/WP.63/Add.12).

193. No comments of substance were made with respect to section B, "Expedited reorganization proceedings".

Chapter VI. Management of proceedings

A. Treatment of creditor claims

194. The suggestion was made that the draft legislative guide should include further discussion of the complex question of subordination of claims (see A/CN.9/WG.V/WP.63/Add.13).

195. It was noted that the Working Group had not completed its deliberations on the remaining parts of the draft guide and no comments of substance were raised with respect to sections B, "Post-commencement finance", and C, "Priorities and distribution" (see A/CN.9/WG.V/WP.63/Add.14); section D, "Treatment of corporate groups in insolvency" (see A/CN.9/WG.V/WP.63/Add.16); the remaining part of the latter document dealing with rights of review and appeal of the debtor and creditors; and chapter VII, "Resolution of proceedings" (see A/CN.9/WG.V/WP.63/Add.15).

Applicable law governing in insolvency proceedings

196. The Commission noted that the Working Group had not had the opportunity to consider the issue of applicable law governing in insolvency proceedings, but wide support was expressed for the importance of the issue to insolvency proceedings and the desirability of treating the topic in the draft legislative guide (see A/CN.9/WG.V/WP.63/Add.17).

B. Approval in principle of the draft UNCITRAL legislative guide on insolvency law

197. Having considered the draft legislative guide, the Commission approved it in principle as follows:

The United Nations Commission on International Trade Law,

Recognizing the importance to all countries of strong insolvency regimes,

Recognizing also that it is demonstrably in the public interest to have a functioning insolvency regime as a means of encouraging economic development and investment,

Noting the growing realization that reorganization regimes are critical to corporate and economic recovery, the development of entrepreneurial activity, the preservation of employment and the availability of venture capital,

Noting also that the effectiveness of reorganization regimes affects the pricing of loans in the capital market, with comparative analysis of such systems becoming both common and essential for lending purposes,

Noting further the importance of social policy issues to the design of an insolvency regime,

Recognizing that solutions to the key legal and legislative issues raised by insolvency that are negotiated internationally through a process involving a broad range of constituents will be useful both to States that do not have an effective and efficient insolvency regime and to States that are undertaking a process of review and modernization of their insolvency regimes,

Recognizing also that the text developed by Working Group V (Insolvency Law) was prepared in the light of, and is compatible with, the text of the UNCITRAL Model Law on Cross-Border Insolvency,[1] and that those texts will form, together with the draft UNCITRAL legislative guide on security interests, key elements in a modern commercial law framework,

Noting the collaboration between Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the treatment of secured creditors and security interests in insolvency,

Recalling the mandate given to Working Group V to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches and recommendations,

Recognizing the work conducted on insolvency law reform by other international organizations, including the World Bank, the International Monetary Fund, the Asian Development Bank, the International Bar Association, the International Federation of Insolvency Professionals and others, and the need for cooperation and coordination between those organizations and the Commission to achieve consistency and alignment in the work under way and to facilitate the development of international standards,

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[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), annex I.

Noting the progress of Working Group V in finalizing the draft legislative guide, and considering that, in view of the substantial completion of core elements and the demand for a text that can be used in law reform efforts, the draft guide could be applied even before its final adoption in 2004,

Stressing the need to complete work on the final text of the draft legislative guide as expeditiously as possible,

1. *Expresses its appreciation* to Working Group V (Insolvency Law) for its work in developing the draft UNCITRAL legislative guide on insolvency law;

2. *Approves in principle* the policy considerations reflected in the draft legislative guide and the key objectives, general features and structure of an insolvency regime as being responsive to the mandate given to the Working Group, subject to completion consistent with the key objectives;

3. *Requests* the secretariat to make the draft legislative guide available to Member States, relevant intergovernmental and non-governmental international organizations, as well as private sector and regional organizations and individual experts, for comment as soon as possible;

4. *Recommends* that the secretariat coordinate and cooperate with the World Bank to identify points of difference between its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, currently being revised, and the draft legislative guide at the level of key principles, and identify a process for achieving alignment of those texts within the constraints of the process of each participating body and within the time frame for completion of the draft legislative guide;

5. *Recommends also* the continued collaboration between Working Group V (Insolvency Law) and Working Group VI (Security Interests) in finalizing the draft legislative guide on insolvency law;

6. *Requests* Working Group V (Insolvency Law) to complete its work on the draft legislative guide and to submit it to the Commission at its thirty-seventh session for finalization and adoption.

V. Arbitration

198. At its thirty-second session, in 1999, the Commission had before it a note by the Secretariat entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). The Commission continued its work on the issue at its subsequent sessions. A full account of the Commission's deliberations at those sessions can be found in the relevant reports of the Commission.[6]

199. At its current session, the Commission took note with appreciation of the reports of Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh (Vienna, 7-11 October 2002) and its thirty-eighth (New York, 12-16 May 2003) sessions (A/CN.9/523 and A/CN.9/524, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the issue of interim measures of protection.

200. With regard to the issue of the power of an arbitral tribunal to order interim measures of protection, the Commission noted that, at its thirty-seventh session, the Working Group had considered a revised draft text of article 17 of the UNCITRAL Model Law on International Commercial Arbitration on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.119) and a proposal by a State (A/CN.9/WG.II/WP.121). The issue whether to include a provision allowing for interim measures to be ordered ex parte by an arbitral tribunal had also been discussed at the thirty-seventh session of the Working Group (A/CN.9/523, paras. 16-27). The Commission noted that, in accordance with those discussions, a revised draft had been prepared by the secretariat for discussion at a future session of the Working Group (see A/CN.9/WG.II/WP.123).

201. With regard to the issue of recognition and enforcement of interim measures of protection, the Commission noted that the Working Group had had a brief discussion on that issue at its thirty-seventh session based on the note by the Secretariat (A/CN.9/WG.II/WP.119, para. 83) and the draft text (also reproduced in document A/CN.9/523, paras. 78 and 79). The Commission noted that the discussions had continued at the thirty-eighth session of the Working Group (see A/CN.9/524) and that the secretariat had been requested to prepare a revised text setting out the various options discussed by the Working Group.

202. The Commission also noted that, at its thirty-eighth session, the Working Group had considered, on the basis of the note by the Secretariat (A/CN.9/WG.II/WP.119, paras. 75-81), a possible draft provision expressing the power of the court to order interim measures of protection in support of arbitration, irrespective of the country where the arbitration took place. The Commission observed that, while the Working Group had expressed general support for such a provision, different views had been expressed as to the criteria and standards for the issuing of such measures (A/CN.9/524, paras. 77 and 78). It was noted that a revised draft provision based on the discussions in the Working Group would be prepared by the secretariat for consideration by the Working Group at a future session.

203. The Commission agreed that it was unlikely that all the topics, namely, the written form for arbitration agreements and the various issues to be considered in the area of interim measures of protection, could be finalized by the thirty-seventh session of the Commission, in 2004. It was the understanding of the Commission that the Working Group would give a degree of priority to interim measures of protection and the Commission noted the suggestion that the issue of ex parte interim measures, which the Commission agreed remained a point of controversy, should not delay progress on that topic.

204. With respect to future work, the Commission was informed that the secretariat had held an expert group meeting in conjunction with, and at the initiative of, the Organisation for Economic Cooperation and Development, which had found that arbitration was an appropriate method for resolving intra-corporate disputes, in particular where the disputes involved parties from different States. The question of arbitrability was considered central to that work. The Commission took note that arbitrability, a topic that had been accorded low priority by the Commission in the programme of work of the Working Group,[7] could be reassessed when considering future work. The Commission also heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) could be considered for inclusion in future work, once

the existing projects currently being considered by the Working Group had been completed.

VI. Transport law

205. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[8] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.[9]

206. At its current session, the Commission had before it the reports of the tenth (Vienna, 16-20 September 2002) and eleventh (New York, 24 March-4 April 2003) sessions of the Working Group (A/CN.9/525 and A/CN.9/526, respectively).

207. The Commission was mindful of the magnitude of the project undertaken by the Working Group and expressed appreciation for the progress accomplished so far. It was widely felt that, having recently completed its first reading of the draft instrument on transport law, the Working Group had reached a particularly difficult phase of its work. The Commission noted that a considerable number of controversial issues remained open for discussion regarding the scope and the individual provisions of the draft instrument. Further progress would require a delicate balance being struck between the various conflicting interests at stake. The view was expressed that a door-to-door instrument might be achieved by a compromise based on uniform liability, choice of forum and negotiated contracts, which would not deal with actions against performing inland parties. It was also stated that involving inland road and rail interests was critical to achieving the objectives of the text. The view was expressed that increased flexibility in the design of the proposed instrument should continue to be explored by the Working Group to allow for States to opt in to all or part of the door-to-door regime.

208. The Commission also noted that, in view of the complexities involved in the preparation of the draft instrument, the Working Group had met at its eleventh session for a duration of two weeks, thus making use of additional conference time that had been made available by Working Group I completing its work on privately financed infrastructure projects at its fifth session, in September 2002. The Chairman of Working Group III confirmed that, if progress on the preparation of the draft instrument was to be made within an acceptable time frame, the Working Group would need to continue holding two-week sessions. After discussion, the Commission authorized Working Group III, on an exceptional basis, to hold its twelfth and thirteenth sessions on the basis of two-week sessions (for the general discussion regarding the allocation of conference time to the various working groups, see below, paras. 270-275 and 277-278). It was agreed that the situation of

the Working Group in that respect would need to be reassessed at the thirty-seventh session of the Commission, in 2004. The Working Group was invited to make every effort to complete its work expeditiously and, for that purpose, to use every possibility of holding intersessional consultations, possibly through electronic mail. The Commission realized, however, that the number of issues open for discussion and the need to discuss many of them simultaneously made it particularly relevant to hold full-scale meetings of the Working Group.

VII. Electronic commerce

209. At its thirty-fourth session, in 2001,[10] the Commission endorsed a set of recommendations for future work made by Working Group IV (Electronic Commerce) at its thirty-eighth session (New York, 12-23 March 2001) and set out in the report of the Working Group (A/CN.9/484, para. 134). A full list of the recommendations may be found in the report of the Commission on its thirty-fifth session, in 2002.[11]

210. At its thirty-sixth session, the Commission took note of the reports of the Working Group on the work of its fortieth (Vienna, 14-18 October 2002) and its forty-first (New York, 5-9 May 2003) sessions (A/CN.9/527 and A/CN.9/528, respectively).

211. The Commission noted the progress made by the secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief in the importance of that project and its support for the efforts of the Working Group and the secretariat in that respect. The Commission recalled that it had requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues relating to legal barriers to electronic commerce that had been raised in the secretariat's initial survey (A/CN.9/WG.IV/WP.94).[12] In that respect, the Commission took note of the deliberations of the Working Group in connection with the secretariat's initial survey, in particular its endorsement of the conclusions of the secretariat. The Commission noted that the Working Group had recommended that the secretariat expand the scope of the survey to review possible obstacles to electronic commerce in additional instruments that had been proposed to be included in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Commission called on member States to assist the secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

212. The Commission noted with appreciation that the Working Group had continued its consideration of a preliminary draft convention dealing with selected issues on electronic contracting and reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting would be a useful contribution that would facilitate the use of modern means of communication in cross-border commercial transactions. The Commission was informed that the Working Group had undertaken a review of articles 1-11 of the revised text of the

preliminary draft convention and had asked the secretariat to prepare a revised version for consideration at a future session of the Working Group. However, it was observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations.

213. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary draft convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade within the context of its preliminary review of draft article X, which the Working Group had agreed to retain for further consideration (A/CN.9/528, para. 25). The Commission expressed support for the Working Group's efforts to tackle both lines of work simultaneously.

214. The Commission was informed that, at its forty-first session, in 2003, the Working Group had held a preliminary discussion on the question of whether intellectual property rights should be excluded from the draft convention (A/CN.9/528, paras. 55-60). The Commission noted the Working Group's understanding that its work should not be aimed at providing a substantive law framework for transactions involving "virtual goods", nor was it concerned with the question of whether and to what extent "virtual goods" were or should be covered by the United Nations Convention on Contracts for the International Sale of Goods.[13] The question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary draft convention could also apply to transactions involving licensing of intellectual property rights and similar arrangements. The secretariat was requested to seek the views of other international organizations on the question, in particular the World Intellectual Property Organization.

VIII. Security interests

215. At its thirty-fourth session, in 2001, the Commission entrusted Working Group VI (Security Interests) with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity, including inventory.[14] At its thirty-fifth session, in 2002, the Commission confirmed the mandate given to the Working Group and that the mandate should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.[15]

216. At its current session, the Commission had before it the reports of the Working Group on the work of its second (Vienna, 16-20 December 2002) and third (New York, 3-7 March 2003) sessions (A/CN.9/531 and A/CN.9/532, respectively). The Commission also had before it the report of the first joint session of Working Group V (Insolvency Law) and Working Group VI (A/CN.9/535).

217. The Commission commended Working Group VI for having completed the first reading of the chapters of the draft legislative guide on secured transactions (A/CN.9/WG.VI/WP.2 and Add.1-12) and the second reading of two chapters (A/CN.9/WG.VI/WP.6/Add.2 and 5). The Commission also expressed its appreciation to Working Group V and Working Group VI for the progress made during

their first joint meeting on matters of common interest and noted with satisfaction the plans for joint expert meetings. In addition, the Commission noted with appreciation the presentation of modern registration systems of security rights in movable property, such as the system in New Zealand, which was organized in conjunction with the second session of Working Group VI, in December 2002, and for the plan of the secretariat to prepare a paper dealing with technical issues arising in the context of such registries, taking as an example the relevant registration system implemented recently in New Zealand. In that connection, it was suggested that reference should also be made to the *Guide to Movables Registries*, prepared recently by the Asian Development Bank, to the work undertaken under the auspices of the International Civil Aviation Organization towards an international notice-filing registry for international interests under the Convention on International Interests in Mobile Equipment[16] and the Protocol thereto on Matters Specific to Aircraft Equipment (Cape Town, 2001),[17] as well as to other similar papers being prepared by other organizations, such as the European Bank for Reconstruction and Development and the World Bank.

218. Moreover, the Commission emphasized the importance of coordination with organizations with interest and expertise in the field of secured transactions law, such as the International Institute for the Unification of Private Law (Unidroit), the Hague Conference on Private International Law, the World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development and the Asian Development Bank. Reference was made to the current work of Unidroit on security rights in securities, to the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* to the extent they concerned secured transactions, to the Model Law on Secured Transactions and the *Principles* of the European Bank for Reconstruction and Development, to the Asian Development Bank's Guide to Movables Registries and to the Inter-American Model Law on Secured Transactions of 2002 prepared by the Organization of American States. Reference was also made to the need to coordinate with the Hague Conference with respect to the conflict-of-laws chapter of the draft legislative guide on secured transactions, in particular with respect to the law applicable to the enforcement of security rights in the case of insolvency. In that connection, in view of the fact that it was not clear whether Working Group V (Insolvency Law) would address the matter, it was suggested that experts from Working Group V might be asked to contribute to the discussion in Working Group VI.

219. With respect to coordination with the World Bank, the Commission noted an appeal by the Working Group for increased efforts (A/CN.9/532, para. 14) and noted with satisfaction that such efforts were actually under way in order to ensure that the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* and the Commission's texts on secured transactions and insolvency were harmonized to form a single international standard.

220. With respect to the scope of work, it was suggested that Working Group VI should consider covering, in addition to goods (including inventory), certain types of intangible assets, such as trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights, in view of their economic importance for modern financing practices. With respect to the importance of intellectual and industrial property rights, reference was made to equipment financing transactions in which security was also often taken in the trademark relating to such equipment

and to transactions in which security was taken over the entirety of a debtor's assets. In view of the complexity of the matter and the expertise of international organizations such as the World Intellectual Property Organization, it was suggested that increased efforts of coordination and further studies were called for. There was broad support in the Commission for both suggestions. The Commission noted with satisfaction that the secretariat planned to prepare a working paper on those matters in consultation with all interested organizations.

221. As to the substance of the draft legislative guide, it was stated that, while the guide could discuss the various workable approaches to the relevant issues, it should also include clear legislative recommendations. It was observed that, with respect to issues in which alternative recommendations were formulated, the relative merits of each approach, in particular for developing countries and countries with economies in transition, needed to be discussed in detail.

222. After discussion, the Commission confirmed the mandate given to Working Group VI at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory, and its decision at its thirty-fifth session that the mandate should be interpreted widely to ensure an appropriate work product, which should take the form of a legislative guide. The Commission also confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights should be covered in the draft legislative guide.

IX. Monitoring implementation of the 1958 New York Convention

223. The Commission recalled that, at its twenty-eighth session, in 1995,[18] it had approved a project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958, the "New York Convention").[19] It was noted that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, that its purpose was not to monitor individual court decisions applying the New York Convention. The secretariat presented an oral progress report to the Commission informing the Commission that, as at 1 April 2003, there were 133 States parties to the New York Convention and the secretariat had received 66 replies to the questionnaire.

224. The Commission requested the secretariat to intensify its efforts to obtain the information necessary to make progress on the matter and to that end requested that the secretariat recirculate the questionnaire to the States parties to the New York Convention requesting those which had not yet replied to do so as soon as possible and requesting the States parties that had already replied to inform the secretariat about any new developments since their previous replies. The secretariat was also requested to obtain information from other sources, including from inter-governmental and non-governmental organizations.

X. Possible future work in the area of public procurement

225. The deliberations of the Commission on public procurement were based on a note by the Secretariat (A/CN.9/539) that set out current activities of other organizations in the area of public procurement and presented information on practical experience in the implementation of the UNCITRAL Model Law on Procurement of Goods, Construction and Services,[20] since its adoption in 1994.

226. It was observed that the UNCITRAL Model Procurement Law contained procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and had proved to be an important international benchmark in procurement law reform. Legislation based on or largely inspired by the UNCITRAL Model Procurement Law had been adopted in more than 30 jurisdictions in different parts of the world and the use of the UNCITRAL Model Procurement Law had resulted in widespread harmonization of procurement rules and procedures. The Commission's attention was drawn in that connection to the experience of law reform based on the UNCITRAL Model Procurement Law, together with issues that had arisen in the practical application of the Model Law.

227. One area of experience concerned the increased use of electronic commerce for public procurement, including methods based on the Internet, which were capable of further promoting the objectives of procurement legislation. For example, in addition to being efficient, electronic auctions could increase transparency over traditional tendering, while information technologies could be harnessed to improve supplier information. It had been argued, however, that, while many electronic procurement practices could be accommodated through the interpretation of existing laws and rules, undesirable obstacles to the use of electronic commerce in procurement might still remain. Some such obstacles were related to electronic procurement procedures and might not be fully addressed by uniform legislation, in particular the UNCITRAL Model Law on Electronic Commerce (1996)[21] and the UNCITRAL Model Law on Electronic Signatures (2001),[22] which were based on the principle of functional equivalence of electronic and paper-based messages.

228. The Commission was also informed about the activities of selected international and regional organizations in the area of government procurement since the adoption of the UNCITRAL Model Procurement Law in 1994. Those activities reflected the growing importance of procurement regimes for the development of national economies and for regional and interregional integration. They also highlighted the need for harmonized and modern models and for coordination of efforts by international bodies active in the field of procurement.

229. Strong support was expressed for the inclusion of procurement law in the work programme of the Commission. An appropriate framework for public procurement was said to be essential for the efficient and transparent expenditure of public funds. Despite the widely recognized value of the UNCITRAL Model Procurement Law, novel issues and practices had arisen since its adoption, which might justify an effort to adjust its text. It was also observed by one delegate that alternative procurement methods, such as "reverse auction" and "off-the-shelf" purchases, should be taken into account, as those methods were believed to help in curbing collusion among bidders and to offer potential price savings, compared with traditional procurement methods such as tendering.

230. The Commission agreed to request the secretariat to prepare detailed studies on the issues identified in the note by the Secretariat (A/CN.9/539 and Add.1) as a starting point, and to formulate proposals on how to address them with a view to their consideration by a working group that might be convened in the third quarter of 2004, subject to confirmation by the Commission at its thirty-seventh session (see below, para. 278 (a)). It was suggested that the secretariat's studies and proposals should take into account the fact that, in some countries, public procurement was not a matter for legislation, but for internal directives of ministries and government agencies. The Commission's work, it was further suggested, could also extend to the formulation of best practices, model contractual clauses and other forms of practical advice, in addition or as an alternative to legislative guidance. It was expected that the work would be carried out in close cooperation with organizations having experience and expertise in the area, such as the World Bank. The secretariat's studies should take into account the negotiations taking place in other international forums, such as the preparation of an international convention against corruption by the Ad Hoc Committee established by the General Assembly in its resolution 56/260 of 31 January 2002 and the negotiations under the auspices of the World Trade Organization and other international and regional organizations.

XI. Possible future work relating to commercial fraud

231. At its thirty-fifth session,[23] in 2002, the Commission had considered a proposal that its secretariat prepare a study of fraudulent financial and trade practices in various areas of trade and finance for consideration at a future session of the Commission.

232. Also at its thirty-fifth session, the Commission had been informed that many fraudulent practices were international in character, that they had a significant adverse economic impact on world trade and that they also had a negative effect on the legitimate instruments of world trade. It was noted that the incidence of such fraud was growing, in particular since the advent of the Internet, which offered new opportunities for fraud.

233. After consideration of the proposal, the Commission decided that it should consider the question of work in the area of commercial fraud at a future session and requested the secretariat to carry out a study on fraudulent financial and trade practices in various areas of trade and finance. The Commission did not set a time limit for completion of the study, nor did it commit itself to taking action on the basis of it.[24]

234. At its thirty-sixth session, the Commission had before it a note by the Secretariat on possible future work relating to commercial fraud (A/CN.9/540). The Commission noted with appreciation the work of the secretariat in convening a meeting of experts on the topic of commercial fraud in Vienna from 2 to 4 December 2002 and in preparing a note based on that meeting for the consideration of the Commission.

235. It was observed that commercial fraud continued to be an issue of growing concern in international trade and a threat to the world economy in general. It was noted that commercial fraud had grown significantly. It was suggested that the

particular interests of victims of international commercial fraud should be borne in mind in future work in the area.

236. The Commission was informed that the advent and spread of technologies and use of the Internet had markedly affected the growth and incidence of commercial fraud, in particular given its transnational component. The Under-Secretary-General, the Legal Counsel, who also acted as Chairman of the Legal Advisers of the United Nations System, mentioned in that context that the Legal Advisers had discussed the absence of an international legal regime for the Internet. Pursuant to those discussions, the Legal Advisers had agreed on the following points, to be conveyed by them to Member States as appropriate:

(a) The Internet was of fundamental importance as a vehicle of communication, commerce, political and cultural expression, education and scientific cooperation;

(b) Because of the international nature and effects of the Internet, individual national laws and court systems were not able to provide an adequate legal framework for much of the activity that occurred on the Internet;

(c) It was urgent to develop a legal structure and institutions at the international level that favoured the further development of activity on the Internet in an environment of legal certainty and respect for the rule of law and for the international character of activity on the Internet.

237. The Commission's attention was drawn to efforts to combat fraud through international legal instruments in criminal law, both those already in existence (in particular, the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I)) and those in the final stages of negotiation (in particular, the United Nations Convention against Corruption). The Commission considered the role that it could usefully play in that area, given its mandate in the area of international commercial law, in the face of the strong criminal law component of attempts to combat commercial fraud. It was noted that there were difficulties in developing a precise definition of commercial fraud, as a result, in particular, of its civil, regulatory and criminal law dimensions and that such ambiguity, exacerbated by obstacles to cross-border cooperation among the various competent authorities, was in fact used by perpetrators of commercial fraud to their own advantage. It was suggested that the difficulties in defining commercial fraud should not be seen as an impediment to the development of work in the area at the present stage and that a satisfactory definition would be more likely to result after further elucidation of the topic through discussion, dissemination of information and further study. It was noted that a key role for private law in the field could be its usefulness as a tool in the prevention of fraud. In particular, the Commission agreed that existing and future UNCITRAL texts could play an important role in that regard.

238. The Commission was informed that one of the major problems in attempting to combat commercial fraud in an effective manner was the difficulty of bringing together the appropriate public and private bodies necessary to do so. The Commission was seen as having a unique ability to marshal the necessary public and private interests in order to further efforts to combat commercial fraud effectively.

239. The Commission was informed that, for the time being, it could focus on coordinating with other bodies and highlighting awareness of commercial fraud. In that connection, it was mentioned that that could include highlighting the dangers of fraudulent schemes that could have a severe impact on the economies of developing countries, for example, pyramid schemes, especially when those schemes were perpetrated by persons from outside the affected countries. That should be done without intruding into issues pertaining to national criminal and regulatory laws.

240. Strong support was expressed for the recommendation made by the secretariat (A/CN.9/540, paras. 65-67) that an international colloquium be organized to address various aspects of the problem of commercial fraud from the point of view of private law and to permit an exchange of views from various interested parties, including those working in national Governments, intergovernmental organizations and relevant private organizations with a particular interest and expertise in combating commercial fraud. Other interested United Nations bodies could be invited to participate in the colloquium, which would also provide an opportunity to promote an exchange of views with the criminal law and regulatory sectors that combat commercial fraud and to identify matters that could be coordinated or harmonized.

241. The Commission considered that it would be useful to conduct a study of forms of commercial fraud and was informed that it might be possible for the Commission on Crime Prevention and Criminal Justice to conduct such a study through the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime, which could lead the research effort in consultation with UNCITRAL. It was suggested that the proposed colloquium on commercial fraud could serve as a useful forum to define the parameters of the study. The Commission was informed that the process of data collection and analysis would take two to three years and that interim reports would be provided to the Commission on Crime Prevention and Criminal Justice, if required. The Commission, noting that its resources were fully engaged in the formulation of private law rules and related activities, appealed to the Commission on Crime Prevention and Criminal Justice for assistance in conducting a study on commercial fraud as the basis for possible future work in that area. It was noted that the colloquium and related studies to be undertaken in cooperation with the Commission on Crime Prevention and Criminal Justice were considered useful of themselves and that there was no expectation of establishing an intergovernmental working group on commercial fraud.

XII. Case law on UNCITRAL texts, digests of case law on the United Nations Sales Convention and other uniform texts

A. Case law

242. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT), consisting of the preparation of case abstracts, compilation of the full text of decisions and the preparation of research aids and analytic tools such as thesauri and indices. To date, 41 issues of CLOUT have been prepared for publication, dealing with 476 cases. The Commission was informed about new

enhancements to the CLOUT system, including, for the print editions, the addition of a table of cases included in that issue on the front cover, the inclusion of hyperlinks (active in the electronic version) to the full text of the decision in the original language (where available), as well as a hyperlink (active in the electronic version) to a translation into an official language of the United Nations (where available), the inclusion of an acknowledgement of the author of the abstract, the inclusion of keywords (for cases interpreting the UNCITRAL Model Law on International Commercial Arbitration (1985))[25] and comprehensive indexing at the back of each issue. The Commission was informed about the preparation of a new thesaurus on the Model Arbitration Law as well as a comprehensive Model Arbitration Law index. The Commission viewed a demonstration of the new CLOUT search engine, which facilitated indexed access to individual CLOUT abstracts (currently those on the Model Arbitration Law), searchable by CLOUT abstract number, article number, jurisdiction, keyword, party name and date.

243. The Commission expressed its appreciation to the national correspondents for their work in selecting decisions and preparing case abstracts. It was noted that CLOUT continued to be an important aspect of the overall training and technical assistance information activities undertaken by UNCITRAL. The wide distribution of CLOUT in both print and electronic formats promoted the uniform interpretation and application of UNCITRAL texts by facilitating access to decisions and awards from other jurisdictions.

B. Digests of case law on the United Nations Sales Convention and other uniform texts

244. The Commission recalled that, at its thirty-fourth session, in 2001,[26] it had requested its secretariat to prepare, in cooperation with experts and national correspondents, a text in the form of an analytic digest of court and arbitral decisions identifying trends in the interpretation of the United Nations Sales Convention. The Commission, recalling its considerations about the guidelines for preparing such a digest, was informed that, pursuant to its request at its thirty-fifth session,[27] in 2002, a draft digest had been prepared and was being edited, after which it would be circulated to Governments, national correspondents and other interested parties for comment prior to finalization and publication. The Commission expressed its appreciation to the experts and national correspondents for their contribution to the preparation of the initial draft chapters of the digest on the Convention.

245. The Commission was further informed that, pursuant to its request at its thirty-fifth session, the initial drafts of the digest on the Model Arbitration Law had been prepared by its secretariat, which was also exploring the feasibility of preparing a digest of case law on the New York Convention. It was noted that, while the preparation of digests on the United Nations Sales Convention and the UNCITRAL Model Arbitration Law had been carried out in cooperation with national correspondents, there were no national correspondents for the New York Convention and that, therefore, it would be useful to explore the possibility of preparing a digest on that Convention in cooperation with an organization such as the International Council for Commercial Arbitration.

XIII. Training and technical assistance

246. The Commission had before it a note by the Secretariat (A/CN.9/536) describing the training and technical activities undertaken since its thirty-fifth session, in 2002, and the direction of future activities, in particular in view of the increase in the requests for such activities received by the secretariat of the Commission. It was noted that training and technical assistance activities were typically carried out through seminars and briefing missions designed to explain the salient features of UNCITRAL texts and the benefits to be derived from their adoption. Such seminars and briefing missions were often followed by assistance in the drafting or finalizing of legislation.

247. It was also noted that, since the thirty-fifth session of the Commission, such seminars and briefing missions had been organized by the secretariat in the following cities: Belo Horizonte, Brazil (27-29 May 2002); Florianopolis, Brazil (30 May 2002); Quito (4 and 5 July 2002); Guayaquil, Ecuador (8 and 9 July 2002); Dhaka (28 October 2002); Bangkok (20-22 November 2002); Ouagadougou (19-21 November 2002); Astana (3 and 4 February 2003); and Hanoi (2-4 April 2003). In addition, it was noted that members of the secretariat had participated as speakers in a number of meetings convened by other organizations. Moreover, it was noted that a number of requests had been turned down for lack of resources.

248. The Commission expressed its appreciation for the activities undertaken and emphasized the importance of the training and technical assistance programme for the unification and harmonization efforts that were at the heart of the Commission's mandate. It was stated that training and technical assistance were particularly useful for developing countries and countries with economies in transition lacking expertise in the areas covered by the work of UNCITRAL. It was also observed that training and technical assistance activities of the secretariat could play an important role in the economic integration efforts being undertaken by many countries.

249. The Commission expressed its appreciation to France, Greece and Switzerland for their contribution to the UNCITRAL trust fund for symposiums and to Austria, Cambodia, Cyprus, Kenya, Mexico and Singapore for their contributions to the trust fund for travel assistance to developing countries that are members of the Commission and to other States. The Commission also expressed its appreciation to organizations that had contributed to the programme by providing funds or staff or by hosting seminars.

250. Stressing the importance of extrabudgetary funding, the Commission again appealed to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust funds to enable its secretariat to meet the increasing demands for training and assistance and to enable delegates from developing countries to attend UNCITRAL meetings. It was suggested that the secretariat should actively seek contributions from donor countries and organizations, for instance by formulating concrete proposals for projects to support its training and technical assistance activities.

251. In view of the limited resources available to the secretariat of the Commission, whether from budgetary or extrabudgetary resources, strong concern was expressed that the Commission could not fully implement its mandate with regard to training

and technical assistance. The Commission noted the remarks made by the Office of Internal Oversight Services, in its report on the in-depth evaluation of legal affairs (E/AC.51/2002/5, para. 64), to the effect that it would be useful for assessment to be made on the effectiveness of the training and assistance provided and requested the secretariat to consider implementing that suggestion. Concern was also expressed that, without follow-up actions and effective cooperation and coordination between the secretariat and development assistance agencies providing or financing technical assistance, international assistance might lead to the adoption of national laws that did not represent internationally agreed standards. In that connection, the Commission noted with appreciation the initial steps taken to implement the request of the General Assembly that the Secretary-General increase substantially both the human and the financial resources available to the secretariat, part of which would be used to ensure the effective implementation of the training and assistance programme of the Commission and the timely publication and dissemination of its work (see below, paras. 256-261).

XIV. Status and promotion of UNCITRAL legal texts

252. On the basis of a note by the Secretariat (A/CN.9/537), the Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the New York Convention. The Commission noted with pleasure the new action of States and jurisdictions subsequent to the closure of its last session on 28 June 2002 regarding the following instruments:

(a) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). New action by the Syrian Arab Republic; number of States parties: 29;

(b) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New action by Honduras; number of States parties: 62;

(c) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions by Brazil, Jamaica and Qatar; number of States parties: 133;

(d) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that have enacted legislation based on the Model Law: Azerbaijan, Jordan, Paraguay, Illinois (United States of America) and Zambia;

(e) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994). New jurisdictions that have enacted legislation inspired by the Model Law: Gambia, Malawi, Republic of Moldova and Romania;

(f) UNCITRAL Model Law on Electronic Commerce (1996). New jurisdictions that have implemented provisions of the Model Law: Jordan, Mexico, New Zealand, Pakistan, Thailand and Venezuela. New legislation has also been adopted on the basis of the Model Law in the Bailiwick of Guernsey and the Isle of Man (Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland) and the Turks and Caicos Islands (Overseas Dependent Territory of the United Kingdom of Great Britain and Northern Ireland);

(g) UNCITRAL Model Law on Cross-Border Insolvency (1997). New jurisdiction that has enacted legislation based on the Model Law: Japan;

(h) UNCITRAL Model Law on Electronic Signatures (2001). New jurisdiction that has enacted legislation based on the Model Law: Thailand.

253. The Commission noted with appreciation the reports by a number of States that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL. States that had enacted or were about to enact a model law prepared by the Commission or that were considering legislative action regarding a convention resulting from the work of the Commission, were requested to inform the secretariat of the Commission thereof. Consideration might also be given to reporting activities towards legislative action on an UNCITRAL text and legislation influenced by an UNCITRAL text. States that had enacted legislation based on UNCITRAL model laws were requested to provide copies to the UNCITRAL secretariat for inclusion in the UNCITRAL library. In that connection, the Commission was informed that the secretariat was examining the feasibility of including copies of such legislation on the UNCITRAL web site, in the original language and, where available, in a translation, even if unofficial, into one or more of the official languages of the United Nations. Making available domestic enactments of UNCITRAL instruments was said to be useful to other States in their consideration of similar legislative action. Member States were requested to assist the secretariat in obtaining the necessary licences to publish legislation on the UNCITRAL web site, in cases where specific texts or legislation databases were subject to copyright protection.

254. The Commission noted that to be complete and produce practical results, efforts towards the unification and harmonization of trade law needed to result in the adoption and uniform application by States of texts prepared by the Commission. To achieve that result, the Commission requested its secretariat to increase its efforts aimed at assisting States in considering texts prepared by the Commission for adoption. The Commission appealed to the representatives and observers attending the meetings of the Commission and its working groups to contribute, to the extent they deemed appropriate, to facilitating consideration of texts of the Commission by legislative organs of their States.

XV. General Assembly resolutions on the work of the Commission and follow-up to the in-depth evaluation of the work of the Commission's secretariat

A. Resolutions 57/17, 57/18 and 57/20

255. The Commission took note with appreciation of General Assembly resolutions 57/17, on the report of the Commission on the work of its thirty-fifth session, 57/18, on the UNCITRAL Model Law on International Commercial Conciliation, and 57/20, on the enlargement of the membership of the Commission, all of 19 November 2002.

B. Resolution 57/19

256. The Commission also took note with appreciation of General Assembly resolution 57/19 of 19 November 2002 on enhancing coordination in the area of international trade law and strengthening the secretariat of UNCITRAL. Pursuant to paragraph 2 of resolution 57/19, the Commission considered the practical implications of the working methods it had adopted in 2001 (see chap. XVIII below).

257. The Commission recalled its deliberations at its thirty-fifth session,[28] in 2002, regarding the strengthening of its secretariat. The Commission was informed of the budget proposal made with respect to the Office of Legal Affairs of the Secretariat for the biennium 2004-2005, more particularly regarding subprogramme 5 (Progressive harmonization and unification of the law of international trade) of section 8 (Legal affairs) of the proposed programme budget (A/58/6). It was noted that the Legal Counsel, in preparing his submission for the budget requirements of the Office of Legal Affairs for the biennium 2004-2005 had found it possible to increase the level of resources for the UNCITRAL secretariat within the existing resources in the Office. As a result, the Secretary-General was essentially proposing that the International Trade Law Branch be restructured and expanded by three lawyers and one General Service staff member and that it become a division of the Office of Legal Affairs. The Division would be based on two pillars, one dealing primarily with uniform legislation and the other focusing on coordination and external affairs.

258. The first pillar would essentially take care of the traditional function performed by the secretariat of UNCITRAL in support of the legislative activities of the Commission and its working groups. The second pillar would deal essentially with the coordination function and with external affairs as envisaged in General Assembly resolution 2205 (XXI) of 17 December 1966, by which UNCITRAL was established. The role of that pillar would be centred around coordination of the work of international organizations active in the field of international trade law; technical legislative assistance, in particular to developing countries, to facilitate their participation in existing conventions and the implementation of model legislation prepared by UNCITRAL; and dissemination of information on modern legal developments, including case law, in the field of international trade law. In addition, States involved in providing technical assistance to developing countries in areas of commercial law reform were encouraged to use the Commission's documentation and, where feasible, collaborate with its secretariat and other member States in that work.

259. The Commission agreed that the coordination function, already important in 1966, had become essential in recent years, in view of the increased number of organizations, intergovernmental and non-governmental, involved in the production of legal standards. The production of reports on activities of organizations active in the field of international trade law should be resumed. The promotion of uniform legal standards should involve considerably expanded input by the UNCITRAL secretariat in supporting developing countries that required assistance with the technicalities of modernization of their laws. The dissemination of information required considerable resources to maintain and update the CLOUT databases and to produce digests of case law on the main instruments that resulted from the work of

UNCITRAL. That work had already started, but was not progressing rapidly enough to meet demand because of the lack of adequate resources. It was estimated that a total of four Professional staff, headed by a Senior Legal Officer, were the minimum resources necessary for that second pillar.

260. The Commission noted that the above proposal needed to receive a favourable recommendation from both the Fifth Committee and the Sixth Committee of the General Assembly. The Commission urged its member States and the Assembly to take every step necessary to expedite the long-awaited increase in the resources of the secretariat of the Commission.

261. Having strongly supported the proposed creation of the International Trade Law Division, the Commission expressed its particular appreciation to the Under-Secretary-General, the Legal Counsel, for his personal involvement and his decisive contribution to the process of unification, harmonization and modernization of international trade law in the interest of world peace and stability.

XVI. Coordination and cooperation

A. International Institute for the Unification of Private Law (Unidroit)

262. The Secretary-General of the International Institute for the Unification of Private Law (Unidroit) reported on the adoption in 2002 of a Model Law on Disclosure in Franchising and informed the Commission of instruments finalized or adopted since the thirty-fifth session of the Commission, in 2002, or currently being discussed at Unidroit.

263. The Commission was informed of two joint sessions of the Unidroit Governing Council and representatives of Governments of member States ("brainstorming sessions"), which were designed to undertake an in-depth review of mid-term and long-term planning of the activities of Unidroit. In that connection, the Commission noted the request arising from those sessions to set up a common coordinating mechanism of the three organizations engaged in the formulation of universal private law, namely, UNCITRAL, the Hague Conference on Private International Law and Unidroit. One method of coordination would be for their three secretariats to meet once a year with a view to exchanging information regarding ongoing and future work and, in particular, attempting to coordinate dates for working sessions and other meetings so as to enable Governments to plan their participation in the work of all three organizations in a systematic manner. The secretariats should, if possible and where appropriate, also identify ways to involve other regional intergovernmental and international organizations engaged in the formulation of private and commercial law in such coordination.

B. Regional economic commissions of the United Nations

264. The Commission considered a note by Henry M. Joko-Smart (Sierra Leone), Chairman of the twenty-first and thirty-fifth sessions of the Commission, in 1988 and 2002, respectively, on the possible duplication of efforts between the

Commission and the regional commissions of the Economic and Social Council, in particular the Economic Commission for Europe. The note read as follows:

"1. As Chairman of the twenty-first (1988) and thirty-fifth (2002) sessions of UNCITRAL, I propose that the Commission, at its thirty-sixth session (2003), consider certain developments that may increase the risk of a possible overlap or duplication of efforts between UNCITRAL, on the one hand, and regional economic commissions, in particular the Economic Commission for Europe (ECE) of the United Nations, on the other hand. I would like to point out that various budgetary documents published with respect to ECE raise new concerns, in particular in view of the risk of duplication of efforts between such a regional organization and a universal body like UNCITRAL.

"2. For example, the proposed programme budget for the biennium 2004-2005 in respect of the ECE[1] suggests that 'a new impulse will be given to globalizing some of [the] agreements and standards [prepared by ECE], in particular in the areas of transport [and] trade facilitation'.[2] The document mentions a 'growing demand on ECE to organize global conferences and events'.[3] This suggests that the focus of ECE, when promoting its existing norms and standards and preparing new instruments, including legal standards, is increasingly global.

"3. An increase in ECE's activities with respect to norms and standards and an increased policy dialogue on the regulatory framework for trade facilitation are welcome developments for the countries represented in ECE. However, I would suggest that member States take a position about the wisdom of endorsing a new impulse to globalizing ECE work, in view of the fact that ECE is a regional organization and does not have the universal constituency necessary to produce global instruments. Coming from a country that is not represented at the Economic Commission for Europe, I could hardly overstate my surprise at seeing a regional body venturing into global harmonization of law. I believe that delegates from other regions will share my sentiment. If ECE's goal is to participate more actively in global bodies and influence them with the benefit of regional experience and standards, such an activity may be useful, but coordination and oversight by the ECE and UNCITRAL member States will be necessary. My suggestion is not to handicap ECE, but to avoid having the United Nations speak with two voices at the global level.

"4. Difficulties in coordination with ECE are not new. Already in 1995, we at UNCITRAL expressed our general concern with the possible implications of a document (TRADE/WP.4/R.1104), published in preparation for what later became the Centre for Trade Facilitation and Electronic Business (CEFACT), established within ECE.[4] That document suggested that the Economic and Social Council should recognize [CEFACT] as 'the centre of competence for all of the United Nations' in the area of trade facilitation (para. 64). The terms of reference suggested for CEFACT included '[facilitation of] international transactions, through the simplification and harmonization of procedures and

[1] A/58/6 (sect. 20).

[2] Ibid., para. 20.6.

[3] Ibid., para. 20.16.

[4] CEFACT held its first session in 1997.

information flows, thereby contributing to the growth of global commerce. To accomplish this general task, the Committee [should] in particular: review and analyse the procedures required to perform international transactions with a view to their reduction, simplification and harmonization; [...] develop recommendations to address legal issues and remove legal constraints to electronic trade transactions and electronic procedures; coordinate and, where relevant, harmonize the programme of work with other international organizations such as [...] UNCITRAL' (para. 72). As part of the suggested work programme for the proposed new Committee, 'the following would be given high priority: [...] develop recommendations to address legal issues and remove legal constraints to electronic transactions and to electronic procedures' (para. 96).

"5. At that time, we reiterated UNCITRAL's support of ECE's work in the technical field, particularly as regards the development of EDIFACT messages. However, the conclusion by UNCITRAL was that, in view of its general mandate as the core legal body in the field of international trade law in the United Nations system, the above-mentioned proposals by ECE were not acceptable. We then agreed that the matter should be brought to the attention of the General Assembly.[5]

"6. The result was a reaffirmation by the General Assembly of UNCITRAL's mandate to coordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law. The General Assembly further recommended that UNCITRAL, through its secretariat, should continue to maintain close cooperation with the other international organs and organizations, including regional organizations active in the field of international trade law.[6]

"7. In its founding resolution 2205 (XXI), UNCITRAL received from the General Assembly, as the first task of its multifaceted role in the progressive harmonization and unification of the law of international trade, the mandate to coordinate the work of organizations active in this field and encourage cooperation among them.[7]

"8. Since 1995, in view of the increase of topics worked on by UNCITRAL, the need to avoid overlap and duplication of work in the United Nations system has become even more pressing. Last year we were informed that the Office of Internal Oversight Services (OIOS), as a result of its in-depth evaluation of legal affairs,[8] had noted that critical situation, particularly in its recommendations 13, on UNCITRAL's increased coordination with trade law organizations, and 15, on UNCITRAL's expanded programme of work.[9]

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[5] The above discussion is reflected in more detail in the report of the Commission on the work of its twenty-eighth session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 310-313.

[6] General Assembly resolution 50/47.

[7] General Assembly resolution 2205 (XXI), sect. II, para. 8.

[8] See E/AC.51/2002/5.

[9] See E/AC.51/2002/5, para. 82.

"9. I would like to conclude this note by suggesting that, in view of the above illustrations of possible difficulties between UNCITRAL and regional organizations active in the legal field, despite the continued relevance of General Assembly resolution 50/47, it may not be sufficient simply to renew a call for increased cooperation between various units of the United Nations Secretariat. In my view, UNCITRAL should urge each member State and observer to ensure coordination between its delegation to UNCITRAL on the one hand and its delegation to the relevant regional commission on the other hand."

265. The Commission strongly endorsed the remarks made in the note by the Chairman of the twenty-first and thirty-fifth sessions and approved his conclusions. It was stated that the type of difficulty outlined in the note, that is, the potential overlap between the work of a truly global body like the United Nations Commission on International Trade Law and that of a regional body within the United Nations system seeking global outreach was the type of recurring situation that should be avoided as it might damage the image of the United Nations and reduce the effectiveness of its action in support of modernization of trade law and might also result in inefficient use of already scarce resources. The Commission was of the view that the matter should be further discussed by appropriate organs of the General Assembly. The Commission also urged each of its member States to foster coordination between its delegation to UNCITRAL and its delegation to the regional commission for its region.

XVII. Other business

A. Bibliography

266. The Commission noted with appreciation the bibliography of recent writings related to its work (A/CN.9/538). The Commission was informed that the bibliography was being updated on the UNCITRAL web site (www.uncitral.org) on an ongoing basis and that, for each UNCITRAL topic, a consolidated bibliography covering the period 1993-2003 had been made available online. The Commission stressed that it was important for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of relevant publications to its secretariat.

B. Willem C. Vis International Commercial Arbitration Moot

267. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Tenth Willem C. Vis International Commercial Arbitration Moot in Vienna from 11 to 17 April 2003. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Tenth Moot had been based on the United Nations Sales Convention, the Arbitration Rules of the German Institution of Arbitration (DIS), the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention. Some 128 teams from law schools in 40 countries had participated

in the Tenth Moot. The best team in oral arguments was that of the National University of Juridical Sciences, from Calcutta, India. The Commission took note that its secretariat had also organized lectures relating to its work coinciding with the period in which the Moot had been held. It was widely felt that the annual Moot, with its broad international participation, presented an excellent opportunity to disseminate information about uniform law texts and teaching international trade law. It was noted that the Eleventh Willem C. Vis International Commercial Arbitration Moot was to be held in Vienna from 2 to 8 April 2004.

268. On the occasion of the Tenth Moot, the Commission expressed its appreciation to Eric E. Bergsten, former Secretary of the Commission, for successfully developing and directing the annual event since its beginning in 1993/1994, and to the Institute of International Commercial Law for organizing it.

C. UNCITRAL web site

269. The Commission expressed its appreciation for the UNCITRAL web site, regarded as an important component of the Commission's overall programme of information activities and training and technical assistance. It was noted that the UNCITRAL web site could be accessed worldwide by a wide range of users, including parliamentarians, judges, practitioners and academics. It was stated that the web site provided delegates with rapid access to working texts in the six official languages of the United Nations, thus promoting transparency and facilitating the work of the Commission. Materials on the web site included adopted texts, up-to-date reports on the status of conventions and adopted texts, court and arbitral decisions interpreting UNCITRAL texts (CLOUT) and bibliographies of scholarly writing related to the work of the Commission. The Commission was informed of new enhancements to the UNCITRAL web site, including the ongoing addition of *travaux préparatoires* of UNCITRAL texts, the placement online of all volumes of the *UNCITRAL Yearbook* from 1968 to 1995 and the introduction of the new CLOUT search engine. The UNCITRAL web site was fully navigable in English, French and Spanish. It was anticipated that the site would be fully navigable in Russian by the end of 2003. Possible future developments were discussed, including the possibility of making available online audio and video recordings of lectures about the work of UNCITRAL, making the *UNCITRAL Yearbook* available online in Arabic and Chinese, and creating links to enactment of model laws in their original languages and links to translations of UNCITRAL texts in other languages, such as German and Portuguese.

XVIII. Date and place of future meetings

A. General discussion on the duration of sessions

270. Pursuant to paragraph 2 of General Assembly resolution 57/19 of 19 November 2002 on enhancing coordination in the area of international trade law and strengthening the secretariat of the United Nations Commission on International Trade Law (see above, paras. 256-261), the Commission considered the practical implications of its working methods, in particular as regards the increase from three

to six working groups working in parallel and the corresponding shortening of the duration of the working group sessions from two weeks to one week.

271. The Commission recalled that for many years it had had at its disposal an entitlement of 4 weeks per year to hold its plenary sessions and a total of 12 weeks of conference services per year (6 weeks in Vienna and 6 weeks in New York) to hold its working group sessions. It was also recalled that over the previous two years the Commission had gradually introduced a new pattern of either one-week (five working days) or two-week sessions for working groups. At its thirty-fifth session,[29] in 2002, the Commission considered that, on the whole, its working methods had demonstrated their efficiency, thus implying that the new pattern of meetings introduced in 2001 had proved to be useful. The disadvantage of shortening the duration of a session of a working group from nine days to five days was considered to be outweighed by the advantages, which included the ability of the Commission to work on more than three subjects (which was necessary in view of the pressing need for modernization of commercial laws in an increased number of areas of commercial law); the savings in time and expenditure for delegates attending a given session; and the experience that a number of members of delegations of member States and observers were able to attend a five-working-day session whereas, owing to their busy agenda, they could not attend a two-week session.

272. At its current session, the Commission noted, however, that there were two working groups in particular that, in view of the magnitude of their topics and the need to speed up their work, would benefit from being able to hold two-week sessions without thereby postponing the other working group sessions, which also had urgent topics on their agenda. Such a situation was expected to exist at least during the years 2004 and 2005. The working groups needing an increase in the duration of their sessions were Working Group III (Transport Law) (which had been able to meet for two two-week periods because it had been able to use the conference time of Working Group I) and Working Group VI (Security Interests). It was recalled that Working Group III (Transport Law) was in the process of preparing a preliminary draft instrument on the carriage of goods, which was a particularly lengthy and complex document. Working Group VI (Security Interests) was in the process of preparing a draft guide on secured transactions, which was also a complex instrument and which had to be completed by 2005 in order to fit in with the work of other international organizations.

273. Support was expressed for the extension of the duration of the sessions of Working Group III and Working Group VI. It was recalled that, when it had established the six working groups meeting in a one-week pattern in 2001, the Commission had expressed its understanding that the new arrangements should be used in a flexible manner and that, depending on its relative priority, a working group could devote an entire two-week session to the consideration of only one topic, while other topics could be combined for consideration by a working group within a two-week period of meeting.[30] As to the total number of 12 weeks of conference services per year currently allotted to working group sessions, it was proposed that the Commission should request the Committee on Conferences to allocate the necessary additional resources. The Commission was informed of the practical implications of that proposal, which would require up to four weeks of additional conference meetings and would result in conference costs (e.g. the cost of

conference rooms, document clerks and conference officers, sound recording and engineering and interpretation services).[31]

274. Objections were raised to changing the new meeting pattern only two years after it had been established. It was pointed out that only in exceptional circumstances could such a deviation from established practice be recommended. It was proposed that, should they wish to be considered by the Commission for an increase in the conference resources allocated to them, working groups should make a request indicating the precise reasons for which such a derogation was sought. One delegate stated that neither Working Group III nor Working Group VI had sufficiently explained the reasons for which an increase in conference services was necessary for continuation of its work. Some support was received for the view that, in justifying an increase in conference services, a working group should include a time frame for completion of its task.

275. After discussion, the Commission decided that a spirit of flexibility should prevail when considering the possibility of increasing the amount of conference services allocated to a working group. It was generally agreed that working groups should normally meet for a one-week session twice a year. Within the current entitlement of 12 weeks of conference services for all six working groups, extra time could be allocated to a working group if another working group did not make full use of its entitlement. However, any request for an increase in the duration of sessions that would result in more than 12 weeks of conference services being required by working groups should be reviewed by the Commission, with proper justification being given by each working group regarding the reasons for which a change in the meeting pattern was needed. As to the specific case of Working Group III and Working Group VI, it was noted that two weeks of conference time would become available before the next Commission session, in view of the fact that Working Group I (Procurement) would not reconvene until the second half of 2004. It was decided that those two additional weeks should be allocated to Working Group III for continuation of its work. As to the possibility of adding 1 or 2 weeks to the 12-week allotment to accommodate the needs of Working Group VI, it was decided that the issue might need to be reopened at the next session on the basis of a reasoned request by the Working Group before the matter could be taken to the Committee on Conferences.

B. Thirty-seventh session of the Commission

276. The Commission approved holding its thirty-seventh session in New York from 14 June to 2 July 2004. It was noted that the Commission did not intend to make full use of its four-week allotment of conference services in 2004. The duration of the session might be shortened further, should a shorter session become advisable in view of the draft texts produced by the various working groups.

C. Sessions of working groups up to the thirty-seventh session of the Commission

277. The Commission approved the following schedule of meetings for its working groups, subject to possible cancellation of working group sessions being decided by

the respective working groups in situations where, for lack of the necessary resources, the secretariat could not envisage the timely production of the necessary documentation:

(a) Working Group I (Procurement). The sixth session was rescheduled to be held during the second half of 2004; the two weeks of sessions initially scheduled for Working Group I were allocated to Working Group III (Transport Law) by the Commission to allow it to hold two sessions, for a duration of two weeks each;

(b) Working Group II (Arbitration) is to hold its thirty-ninth session in Vienna from 10 to 14 November 2003, immediately before the session of Working Group IV, and its fortieth session in New York from 23 to 27 February 2004;

(c) Working Group III (Transport Law) is to hold its twelfth session in Vienna from 6 to 17 October 2003 and its thirteenth session in New York from 3 to 14 May 2004;

(d) Working Group IV (Electronic Commerce) is to hold its forty-second session in Vienna from 17 to 21 November 2003, immediately after the session of Working Group II, and its forty-third session in New York from 15 to 19 March 2004, immediately before the session of Working Group V;

(e) Working Group V (Insolvency Law) is to hold its twenty-ninth session in Vienna from 1 to 5 September 2003, immediately before the session of Working Group VI, and its thirtieth session in New York from 22 to 26 March 2004, immediately after the session of Working Group IV;

(f) Working Group VI (Security Interests) is to hold its fourth session in Vienna from 8 to 12 September 2003, immediately after the session of Working Group V, and its fifth session in New York from 29 March to 2 April 2004, immediately after the session of Working Group V.

D. Sessions of working groups after the thirty-seventh session of the Commission

278. The Commission noted that tentative arrangements had been made for working group meetings after its thirty-seventh session (the arrangements are subject to the approval of the Commission at its thirty-seventh session):

(a) Working Group I (Procurement) would hold its sixth session in Vienna from 11 to 15 October 2004, immediately before the session of Working Group IV;

(b) Working Group II (Arbitration) would hold its forty-first session in Vienna from 13 to 17 September 2004;

(c) Working Group III (Transport Law) would hold its fourteenth session in Vienna from 22 November to 3 December 2004 (see paras. 270-275);

(d) Working Group IV (Electronic Commerce) would hold its forty-fourth session in Vienna from 18 to 22 October 2004, immediately after the session of Working Group I;

(e) Working Group V (Insolvency Law). The thirty-first session was rescheduled to be held in 2005, depending on its work programme and subject to the

approval of the Commission; the one-week session initially scheduled for Working Group V to meet during the second half of 2004 was provisionally allocated by the Commission to Working Group III (Transport Law) to allow it to hold a two-week session;

(f) Working Group VI (Security Interests) would hold its sixth session in Vienna from 30 August to 3 September 2004.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its fifty-second session, on 24 November 1997 (decision 52/314), and 17 were elected by the General Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308). By its resolution 31/99 of 15 December 1976, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

[2] United Nations publication, Sales No. E.81.V.6.

[3] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 369.

[4] Ibid.

[5] This section contains provisions that were commented on by the Commission. The full text of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, including provisions that were approved without comments, is provided in annex I.

[6] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 389-399; ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 309-315; and ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 178-184.

[7] Ibid., *Fifty-fourth Session, Supplement No.17* (A/54/17), paras. 351-353.

[8] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[9] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

[10] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 291-293.

[11] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 205.

[12] Ibid., para. 207.

[13] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

[14] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 358 and 359.

[15] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 204.

[16] DCME Doc. No. 74 (ICAO).

[17] DCME Doc. No. 75 (ICAO).

[18] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[19] United Nations, *Treaty Series*, vol. 330, No. 4739.

[20] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[21] United Nations publication, Sales No. E.99.V.4.

[22] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II; see also General Assembly resolution 56/80, annex.

[23] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290.

[24] Ibid., para. 290.

[25] Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[26] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 395.

[27] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 243.

[28] Ibid., paras. 258-271.

[29] Ibid., para. 271.

[30] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 382. The entire discussion held during that session regarding the working methods of the Commission is contained in paragraphs 376-384.

[31] The Commission noted that the total cost for extension by one additional week of a working group session per year in Vienna would be €68,166. The total cost for extension by one additional week of a working group session in New York would be $80,565 for the year 2004 and $82,338 for the year 2005.

Annex I

UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects

Foreword

The following pages contain a set of general recommended legislative principles entitled "legislative recommendations" and model legislative provisions (the "model provisions") on privately financed infrastructure projects. The legislative recommendations and the model provisions are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. They are followed by notes that offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area. The user is advised to read the legislative recommendations and the model provisions together with the notes, which provide background information to enhance the understanding of the legislative recommendations and model provisions.

The legislative recommendations and the model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.

The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability.

It should be noted that the legislative recommendations and the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*.[1] Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law and environmental protection and consumer protection laws. The relationship of such other areas of law to any law enacted specifically with respect to privately financed infrastructure projects should be borne in mind.

[1] United Nations publication, Sales No. E.01.V.4.

Part One

Legislative recommendations

I. General legislative and institutional framework

Constitutional, legislative and institutional framework
(see chap. I, "General legislative and institutional framework", paras. 2-14)

Recommendation 1. *The constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated.*

Scope of authority to award concessions
(see chap. I, "General legislative and institutional framework", paras. 15-22)

Recommendation 2. *The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects.*

Recommendation 3. *Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems.*

Recommendation 4. *The law should identify the sectors or types of infrastructure in respect of which concessions may be granted.*

Recommendation 5. *The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.*

Administrative coordination
(see chap. I, "General legislative and institutional framework", paras. 23-29)

Recommendation 6. *Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.*

Authority to regulate infrastructure services
(see chap. I, "General legislative and institutional framework", paras. 30-53)

Recommendation 7. *The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services.*

Recommendation 8. *Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers.*

Recommendation 9. *The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means.*

Recommendation 10. *The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based.*

Recommendation 11. *Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.*

II. Project risks and government support

Project risks and risk allocation
(see chap. II, "Project risks and government support", paras. 8-29)

Recommendation 12. *No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project.*

Government support
(see chap. II, "Project risks and government support", paras. 30-60)

Recommendation 13. *The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.*

Part Two

Model legislative provisions

I. General provisions

Model provision 1. Preamble
(*see recommendation 1 and chap. I, paras. 2-14*)

WHEREAS the [*Government*] [*Parliament*] of [...] considers it desirable to establish a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

WHEREAS the [*Government*] [*Parliament*] of [...] considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

[*Other objectives that the enacting State might wish to state*];

Be it therefore enacted as follows:

Model provision 2. Definitions
(*see introduction, paras. 9-20*)

For the purposes of this law:

(a) "Infrastructure facility" means physical facilities and systems that directly or indirectly provide services to the general public;

(b) "Infrastructure project" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) "Contracting authority" means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project [*under the provisions of this law*];[1]

(d) "Concessionaire" means the person that carries out an infrastructure project under a concession contract entered into with a contracting authority;

(e) "Concession contract" means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

[1] It should be noted that the authority referred to in this definition relates only to the power to enter into concession contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as "regulatory agency" in subparagraph (h), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

(f) "Bidder" and "bidders" mean persons, including groups thereof, that participate in selection proceedings concerning an infrastructure project;[2]

(g) "Unsolicited proposal" means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) "Regulatory agency" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.[3]

Model provision 3. Authority to enter into concession contracts
(*see recommendation 2 and chap. I, paras. 15-18*)

The following public authorities have the power to enter into concession contracts[4] for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof*].[5]

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[2] The term "bidder" or "bidders" encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

[3] The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, "General legislative and institutional framework", paras. 30-53).

[4] It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, "General legislative and institutional framework", paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see chap. II, "Project risks and government support").

[5] Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to "the Union, the states [or provinces] and the municipalities". In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

Model provision 4. Eligible infrastructure sectors
(*see recommendation 4 and chap. I, paras. 19-22*)

Concession contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].[6]

II. Selection of the concessionaire

Model provision 5. Rules governing the selection proceedings
(*see recommendation 14 and chap. III, paras. 1-33*)

The selection of the concessionaire shall be conducted in accordance with model provisions 6-27 and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts*].[7]

[6] It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

[7] The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (the "Model Procurement Law"). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein.

1. Pre-selection of bidders

Model provision 6. Purpose and procedure of pre-selection
(*see chap. III, paras. 34-50*)

1. The contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].

3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],[8] the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility;

(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire);

(c) Where already known, a summary of the main required terms of the concession contract to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],[9] the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with model provision 7;

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 8;

(c) Whether the contracting authority intends to request only a limited number[10] of pre-selected bidders to submit proposals upon completion of the

[8] A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

[9] A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

[10] In some countries, practical guidance on selection procedures encourages domestic contracting

pre-selection proceedings in accordance with model provision 9, paragraph 2, and, if applicable, the manner in which this selection will be carried out;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*the enacting State*] in accordance with model provision 30.

5. For matters not provided in this model provision, the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification of suppliers and contractors*].[11]

Model provision 7. Pre-selection criteria
(*see recommendation 15 and chap. III, paras. 34-40, 43 and 44*)

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria[12] that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

Model provision 8. Participation of consortia
(*see recommendation 16 and chap. III, paras. 41 and 42*)

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their

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authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", paras. 48 and 49). See also footnote 14.

[11] Procedural steps on pre-qualification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7.

[12] The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", paras. 43 and 44). The *Legislative Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

qualifications in accordance with model provision 7 shall relate to the consortium as a whole as well as to its individual participants.

2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium[13] at the same time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.

3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

Model provision 9. Decision on pre-selection
(*see recommendation 17 (for para. 2) and chap. III, paras. 47-50*)

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 10-17.

2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number[14] of bidders that best meet the pre-selection criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

[13] The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

[14] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", para. 48). It should be noted that the rating system is used solely for the purpose of the pre-selection of bidders. The ratings of the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on an equal standing.

2. Procedure for requesting proposals

Model provision 10. Single-stage and two-stage procedures for requesting proposals

(see recommendations 18 (for para. 1) and 19 (for paras. 2 and 3) and chap. III, paras. 51-58)

1. The contracting authority shall provide a set of the request for proposals and related documents issued in accordance with model provision 11 to each pre-selected bidder that pays the price, if any, charged for those documents.

2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when the contracting authority does not deem it to be feasible to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

3. Where a two-stage procedure is used, the following provisions apply:

(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;[15]

(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The contracting authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the contracting authority;

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant

[15] In many cases, in particular for new types of project, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession contract, in particular the way in which the project risks should be allocated between the parties under the concession contract. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project (see chap. III, "Selection of the concessionaire", paras. 67-70; see further chap. II, "Project risks and government support", paras. 8-29).

to model provision 26 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provisions 11-17.

Model provision 11. Content of the request for proposals
(*see recommendation 20 and chap. III, paras. 59-70*)

To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],[16] the request for proposals shall include at least the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;[17]

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;[18]

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Model provision 12. Bid securities
(*see chap. III, para. 62*)

1. The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:[19]

(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 17, paragraph 1;

[16] A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

[17] A list of elements that should be provided can be found in chapter III, "Selection of the concessionaire", paragraphs 61 and 62, of the *Legislative Guide*.

[18] See chapter III, "Selection of the concessionaire", paragraphs 64-66.

[19] General provisions on bid securities can be found in article 32 of the Model Procurement Law.

(c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 17, paragraph 2;

(d) Failure to sign the concession contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the concession contract after the proposal has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

Model provision 13. Clarifications and modifications
(*see recommendation 21 and chap. III, paras. 71 and 72*)

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 11. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 26 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

Model provision 14. Evaluation criteria
(*see recommendations 22 (for para. 1) and 23 (for para. 2) and chap. III, paras. 73-77*)

1. The criteria for the evaluation and comparison of the technical proposals[20] shall include at least the following:

(a) Technical soundness;

(b) Compliance with environmental standards;

(c) Operational feasibility;

(d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the financial and commercial proposals[21] shall include, as appropriate:

(a) The present value of the proposed tolls, unit prices and other charges over the concession period;

(b) The present value of the proposed direct payments by the contracting authority, if any;

(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) The extent of financial support, if any, expected from a public authority of [*the enacting State*];

(e) Soundness of the proposed financial arrangements;

[20] See chapter III, "Selection of the concessionaire", paragraph 74.
[21] See chapter III, "Selection of the concessionaire", paragraphs 75-77.

(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

(g) The social and economic development potential offered by the proposals.

Model provision 15. Comparison and evaluation of proposals
(*see recommendation 24 and chap. III, paras. 78-82*)

1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.[22]

Model provision 16. Further demonstration of fulfilment of qualification criteria
(*see recommendation 25 and chap. III, paras. 78-82*)

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.[23]

Model provision 17. Final negotiations
(*see recommendations 26 (for para. 1) and 27 (for para. 2) and chap. III, paras. 83 and 84*)

1. The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and

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[22] This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, "Selection of the concessionaire", paragraphs 79-82, of the *Legislative Guide*, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the *Legislative Guide* are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process.

[23] Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find that proposal acceptable, it shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

3. Negotiation of concession contracts without competitive procedures

Model provision 18. Circumstances authorizing award without competitive procedures
(*see recommendation 28 and chap. III, para. 89*)

Subject to approval by [*the enacting State indicates the relevant authority*],[24] the contracting authority is authorized to negotiate a concession contract without using the procedure set forth in model provisions 6 to 17 in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 6 to 17 would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [*the enacting State specifies a monetary ceiling*]] [set forth in [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a privately financed infrastructure project may be awarded without competitive procedures*]];[25]

(c) Where the project involves national defence or national security;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property,

[24] The rationale for subjecting the award of the concession contract without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, "Selection of the concessionaire", paras. 85-96). The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

[25] As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In cases of unsolicited proposals falling under model provision 23;

(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgement of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award within a required time frame;[26]

(g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.[27]

Model provision 19. Procedures for negotiation of a concession contract
(*see recommendation 29 and chap. III, para. 90*)

Where a concession contract is negotiated without using the procedures set forth in model provisions 6-17 the contracting authority shall:[28]

(a) Except for concession contracts negotiated pursuant to model provision 18, subparagraph (c), cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*];

(b) Engage in negotiations with as many persons as the contracting authority judges capable[29] of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

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[26] The enacting State may wish to require that the contracting authority include in the record to be kept pursuant to model provision 26 a summary of the results of the negotiations and indicate the extent to which those results differed from the project specifications and contractual terms of the original request for proposals, and that it state the reasons therefor.

[27] Enacting States that deem it desirable to authorize the use of negotiated procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the competitive selection procedures may in turn prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of negotiated procedures that may be provided under specific legislation.

[28] A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, "Selection of the concessionaire", paragraphs 90-96, of the *Legislative Guide*.

[29] Enacting States wishing to enhance transparency in the use of negotiated procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 18 and 19. An indication of possible qualification criteria is contained in model provision 7.

4. Unsolicited proposals[30]

Model provision 20. Admissibility of unsolicited proposals
(*see recommendation 30 and chap. III, paras. 97-109*)

As an exception to model provisions 6 to 17, the contracting authority[31] is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 21 to 23, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

Model provision 21. Procedures for determining the admissibility of unsolicited proposals
(*see recommendations 31 (for paras. 1 and 2) and 32 (for para. 3) and chap. III, paras. 110-112*)

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest.[32]

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications[33] and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

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[30] The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, "Selection of the concessionaire", paragraphs 98-100, of the *Legislative Guide*. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 21-23.

[31] The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 24 and the references cited therein).

[32] The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

[33] The enacting State may wish to provide in regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 7.

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

Model provision 22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights
(*see recommendation 33 and chap. III, paras. 113 and 114*)

1. Except in the circumstances set forth in model provision 18, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 6 to 17 if the contracting authority considers that:

(a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(b) The proposed concept or technology is not truly unique or new.

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

Model provision 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights
(*see recommendations 34 (for paras. 1 and 2) and 35 (for paras. 3 and 4) and chap. III, paras. 115-117*)

1. If the contracting authority determines that the conditions of model provision 22, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 6 to 17. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4.[34]

2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].

[34] The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, mutatis mutandis, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law.

3. If no proposals in response to an invitation issued pursuant to paragraph 2 are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 19. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals pursuant to model provisions 10 to 17, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 22, paragraph 2.

5. Miscellaneous provisions

Model provision 24. Confidentiality
(*see recommendation 36 and chap. III, para. 118*)

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to model provisions 10, paragraph 3, 17, 18, 19 or 23, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order or permitted by the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

Model provision 25. Notice of contract award
(*see recommendation 37 and chap. III, para. 119*)

Except for concession contracts awarded pursuant to model provision 18, subparagraph (c), the contracting authority shall cause a notice of the contract award to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession contract.

Model provision 26. Record of selection and award proceedings
(*see recommendation 38 and chap. III, paras. 120-126*)

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*].[35]

[35] The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, are discussed in chapter III, "Selection of the concessionaire", paragraphs 120-126.

Model provision 27. Review procedures
(*see recommendation 39 and chap. III, paras. 127-131*)

A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].[36]

III. Contents and implementation of the concession contract

Model provision 28. Contents and implementation of the concession contract
(*see recommendation 40 and chap. IV, paras. 1-11*)

The concession contract shall provide for such matters as the parties deem appropriate,[37] such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire (*see chap. IV, para. 1*);

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract (*see recommendation 5*);

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30 (*see recommendations 42 and 43 and model provision 30*);

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 31 to 33 (*see recommendations 44 and 45 and model provisions 31 to 33*);

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of the *Legislative Guide*. The content of such a record for the various types of project award is further set out in article 11 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

[36] Elements for the establishment of an adequate review system are discussed in chapter III, "Selection of the concessionaire", paragraphs 127-131, of the *Legislative Guide*. They are also contained in chapter VI of the Model Procurement Law. If the laws of the enacting State do not provide such an adequate review system, the enacting State should consider adopting legislation to that effect.

[37] Enacting States may wish to note that the inclusion in the concession contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority (*see recommendations 46 and 48*);

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility (*see recommendation 52*);

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (*see recommendation 53 and model provision 38*);

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements (*see recommendations 52 and 54, subpara. (b)*);

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations (*see recommendation 54, subpara. (a)*);

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled (see *chap. IV, paras. 73 to 76*);

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons (*see recommendation 56*);

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project (*see recommendation 58, subparas. (a) and (b)*);

(n) Remedies available in the event of default of either party (*see recommendation 58, subpara. (e)*);

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control (*see recommendation 58, subpara. (d)*);

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination (*see recommendation 61*);

(q) The manner for calculating compensation pursuant to model provision 47 (*see recommendation 67*);

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire (*see recommendation 69 and model provisions 29 and 49*);

(s) The rights and obligations of the parties with respect to confidential information (*see model provision 24*).

Model provision 29. Governing law
(*see recommendation 41 and chap. IV, paras. 5-8*)

The concession contract is governed by the law of [*the enacting State*] unless otherwise provided in the concession contract.[38]

Model provision 30. Organization of the concessionaire
(*see recommendations 42 and 43 and chap. IV, paras. 12-18*)

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*the enacting State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the concession contract consistent with the terms of the request for proposals.

[38] Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also *Legislative Guide*, chap. VII, "Other relevant areas of law", paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of an infrastructure project (see generally *Legislative Guide*, chap. VII, "Other relevant areas of law", sect. B).

Model provision 31. Ownership of assets[39]
(see recommendation 44 and chap. IV, paras. 20-26)

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

Model provision 32. Acquisition of rights related to the project site
(see recommendation 45 and chap. IV, paras. 27-29)

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with (*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*).

[39] Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see *Legislative Guide*, "Introduction and background information on privately financed infrastructure projects", paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 20-26). Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire's ability to create security interests in project assets for the purpose of raising financing for the project (ibid., paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.

Model provision 33. Easements[40]
(see recommendation 45 and chap. IV, para. 30)

Variant A

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

Variant B

1. The concessionaire shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

Model provision 34. Financial arrangements
(see recommendations 46, 47 and 48 and chap. IV, paras. 33-51)

1. The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].[41]

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[40] The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 30-32).

[41] Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the *Legislative Guide* as "tariffs", may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, "Project risks and government support", paras. 30-60). The cost at which public services are provided is typically an element of the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules

2. The contracting authority shall have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

Model provision 35. Security interests
(*see recommendation 49 and chap. IV, paras. 52-61*)

1. Subject to any restriction that may be contained in the concession contract,[42] the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

Model provision 36. Assignment of the concession contract
(*see recommendation 50 and chap. IV, paras. 62 and 63*)

Except as otherwise provided in model provision 35, the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

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of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of "reasonableness", "fairness" or "equity" (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 36-46).

[42] These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

Model provision 37. Transfer of controlling interest[43] in the concessionaire
(*see recommendation 51 and chap. IV, paras. 64-68*)

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

Model provision 38. Operation of infrastructure
(*see recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2)*)

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

(a) The modification of the service so as to meet the demand for the service;

(b) The continuity of the service;

(c) The provision of the service under essentially the same conditions for all users;

(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

Model provision 39. Compensation for specific changes in legislation
(*see recommendation 58, subpara. (c), and chap. IV, paras. 122-125*)

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

Model provision 40. Revision of the concession contract
(*see recommendation 58, subpara. (c), and chap. IV, paras. 126-130*)

1. Without prejudice to model provision 39, the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost

[43] The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

(a) Changes in economic or financial conditions; or

(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

(a) Occur after the conclusion of the contract;

(b) Are beyond the control of the concessionaire; and

(c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.

Model provision 41. Takeover of an infrastructure project by the contracting authority
(*see recommendation 59 and chap. IV, paras. 143-146*)

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

Model provision 42. Substitution of the concessionaire
(*see recommendation 60 and chap. IV, paras. 147-150*)

The contracting authority may agree with the entities extending financing for an infrastructure project and the concessionaire to provide for the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.[44]

[44] The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

IV. Duration, extension and termination of the concession contract

1. Duration and extension of the concession contract

Model provision 43. Duration and extension of the concession contract
(*see recommendation 62 and chap. V, paras. 2-8*)

The duration of the concession shall be set forth in the concession contract. The contracting authority may not agree to extend its duration except as a result of the following circumstances:

(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control;

(b) Project suspension brought about by acts of the contracting authority or other public authorities;

(c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs without such extension; or

(d) [*Other circumstances, as specified by the enacting State*].[45]

2. Termination of the concession contract

Model provision 44. Termination of the concession contract by the contracting authority
(*see recommendation 63 and chap. V, paras. 14-27*)

The contracting authority may terminate the concession contract:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For compelling[46] reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

(c) [*Other circumstances that the enacting State might wish to add in the law*].

[45] The enacting State may wish to consider the possibility for the law to authorize a consensual extension of the concession contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 26.

[46] Possible situations of a compelling reason of public interest are discussed in chapter V, "Duration, extension and termination of the project agreement", paragraph 27, of the *Legislative Guide*.

Model provision 45. Termination of the concession contract by the concessionaire
(*see recommendation 64 and chap. V, paras. 28-33*)

The concessionaire may not terminate the concession contract except under the following circumstances:

(a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;

(b) If the conditions for a revision of the concession contract under model provision 40, paragraph 1, are met, but the parties have failed to agree on a revision of the concession contract; or

(c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, such as those referred to in model provision 28, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the concession contract.

Model provision 46. Termination of the concession contract by either party
(*see recommendation 65 and chap. V, paras. 34 and 35*)

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

3. Arrangements upon termination or expiry of the concession contract

Model provision 47. Compensation upon termination of the concession contract
(*see recommendation 67 and chap. V, paras. 43-49*)

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Model provision 48. Wind-up and transfer measures
(*see recommendation 66 and chap. V, paras. 37-42 (for subpara. (a)) and recommendation 68 and chap. V, paras. 50-62 (for subparas. (b)-(d))*

The concession contract shall provide, as appropriate, for:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority;

(b) The compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority;

(c) The transfer of technology required for the operation of the facility;

(d) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(e) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

V. Settlement of disputes

Model provision 49. Disputes between the contracting authority and the concessionaire
(*see recommendation 69 and chap. VI, paras. 3-41*)

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.[47]

Model provision 50. Disputes involving customers or users of the infrastructure facility
(*see recommendation 71 and chap. VI, paras. 43-45*)

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

Model provision 51. Other disputes
(*see recommendation 70 and chap. VI, para. 42*)

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

[47] The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.

Annex II

List of documents before the Commission at its thirty-sixth session

Symbol	*Title or description*
A/CN.9/519	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-sixth session
A/CN.9/520	[*Not issued.*]
A/CN.9/521	Report of Working Group I (Privately Financed Infrastructure Projects) on the work of its fifth session (Vienna, 9-13 September 2002)
A/CN.9/522 and Add.1 and 2	Note by the Secretariat on the draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and consolidated final draft of the model legislative provisions
A/CN.9/523	Report of Working Group II (Arbitration) on the work of its thirty-seventh session (Vienna, 7-11 October 2002)
A/CN.9/524	Report of Working Group II (Arbitration) on the work of its thirty-eighth session (New York, 12-16 May 2002)
A/CN.9/525	Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002)
A/CN.9/526	Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March-4 April 2003)
A/CN.9/527	Report of Working Group IV (Electronic Commerce) on the work of its fortieth session (Vienna, 14-18 October 2002)
A/CN.9/528	Report of Working Group IV (Electronic Commerce) on the work of its forty-first session (New York, 5-9 May 2003)
A/CN.9/529	Report of Working Group V (Insolvency Law) on the work of its twenty-seventh session (Vienna, 9-13 December 2002)
A/CN.9/530	Report of Working Group V (Insolvency Law) on the work of its twenty-eighth session (New York, 24-28 February 2003)
A/CN.9/531	Report of Working Group VI (Security Interests) on the work of its second session (Vienna, 17-20 December 2002)
A/CN.9/532	Report of Working Group VI (Security Interests) on the work of its third session (New York, 3-7 March 2003)
A/CN.9/533 and Add. 1-7	Note by the Secretariat on the draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects: compilation of comments by Governments and international organizations
A/CN.9/534	Note by Secretariat on the draft legislative guide on insolvency law
A/CN.9/535	Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their first joint session (Vienna, 16 and 17 December 2002)
A/CN.9/536	Note by the Secretariat on training and technical assistance
A/CN.9/537	Note by the Secretariat on the status of conventions and model laws

Symbol	*Title or description*
A/CN.9/538	Note by the Secretariat: bibliography of recent writings related to the work of UNCITRAL
A/CN.9/539 and Add.1	Note by the Secretariat on current activities of international organizations in the area of public procurement: possible future work
A/CN.9/540	Note by the Secretariat on possible future work relating to commercial fraud

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